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ADVOCATE, AND OF THE MIDDLE TEMPLE BARRISTER-AT-LAW

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*N.B.—The Scottish Text-Books and Reports are in italics. For Table showing dates and number of volumes, see page xxi.*

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Arn. . . . .	. Arnold's Reports
A.S. or Act of Sed. .	. <i>Act of Sederunt</i>
Asp. M. C. . . . .	. Aspinall's Maritime Cases
Ass. Tax. . . . .	. Assessed Taxes (Decisions of Judges)
Ast. Ent. . . . .	. Aston's Entries
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Ayl. Par. . . . .	. Ayliffe's Parergon Juris

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<i>C. or Codex</i> . . .	<i>Divi Justiniani Codicis libri duodecim; in Corpus Juris Civilis. [The fragment precedes, the book and title (within brackets) succeed, the initial.]</i>
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Curt. . . . .	Curteis' Ecclesiastical Reports
D. . . . .	<i>Dunlop's Series of the Court of Session Reports (the Second Series),</i> 24 vols., 1838-62

D. (followed by a bracket)	Justiniani Digestorum seu pandectarum libri quinquaginta ;
or Dig.	in Corpus Juris Civilis. [The fragment precedes, the book and title succeed, the initial.]
D. & Mer.	Davison and Merivale's Reports
<i>D. H. L.</i>	<i>Dunlop's Reports (House of Lords part)</i> , vols. 17 to 24, 1854-62
D. & L.	Dowling and Lowndes' Practice Cases
D. & Ry.	Dowling and Ryland's Reports
Dal.	Dalison's Reports
<i>Dallas, Styles</i>	<i>Dallas' Styles of Writs</i> , 2nd ed.
<i>Dabr.</i>	<i>Dalrymple's Decisions, Court of Session</i>
Dan.	Daniel's Reports
Dan. & Ll.	Danson and Lloyd's Mercantile Cases
Davis	Davis' (Sir John) Reports
Deac.	Deacon's Bankruptcy Cases
Deac. & Ch.	Deacon and Chitty's Reports
De G.	De Gex's Bankruptcy Reports
De G. F. & J.	De Gex, Fisher, and Jones' Reports
De G. & J.	De Gex and Jones' Reports
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Dea & Sw.	Deane and Swabey's Reports
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Dears. & B.	Dearsley and Bell's Crown Cases
<i>Deas &amp; And.</i>	<i>Deas and Anderson's Reports</i>
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<i>Dirleton</i>	<i>Dirleton's Decisions</i>
<i>Dirleton's Doubts</i>	<i>Dirleton's Doubts and Questions in the Law, especially of Scotland</i> , folio, 1698
D. & S.	Doctor and Student
Dod.	Dodson's Reports
Doug.	Douglas' Reports
Doug. Q. B.	Douglas' Reports, Queen's Bench
Dow	Dow's Reports
Dow & Cl.	Dow and Clark's Cases
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Dowl. P. R.	Dowling's Practice Reports
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Drew. & Sm.	Drewry and Smale's Reports
<i>Duff</i>	<i>Duff on Feudal Conveyancing</i>
<i>Dugd. Orig.</i>	<i>Dugdale's Origines</i>
<i>Duncan Par. Ecc. Law</i>	<i>Duncan on Parochial-Ecclesiastical Law</i> , 2nd ed.
Durn. & E.	Durnford and East, or Term Reports
<i>Durie</i>	<i>Durie's Reports</i>
Dy.	Dyer's Reports
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Eag. & Y.	Eagle and Younge's Tithe Cases
East	East's Reports
East P. C.	East's Pleas of the Crown
Eden.	Eden's Reports
<i>Edg.</i>	<i>Edgar's Reports</i>
Edw.	Edward's Reports
El. B. & S.	Ellis, Best, and Smith's Reports
El. & Bl.	Ellis and Blackburn's Reports
El. B. & E.	Ellis, Blackburn, and Ellis' Reports
El. & E.	Ellis and Ellis' Reports
<i>Elch. or Elchies</i>	<i>Lord Elchies' Court of Session Decisions (and in vol. 24 Morison's Dictionary)</i>
Eq. Ca. Abr.	Equity Cases Abridged
Eq. Rep.	Equity Reports
<i>Ersk. or Ersk. Inst.</i>	<i>Erskine's Institute of the Law of Scotland</i> , by J. B. Nicolson

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Marr. . . . .	Marriott's Reports



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<i>Thoms. Acts.</i>	<i>Collection by Thomson and Innes of the Scots Acts of Parliament (with Index, 13 vols.), 1124-1707</i>
Thorn	Thornton's Notes of Cases
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Turn & R.	Turner and Russell's Reports
Tyrw.	Tyrwhitt's Reports
Tyr. & Gr.	Tyrwhitt and Granger's Reports
Ulp.	Ulpiani Fragmenta
Ult.	<i>In ultimo</i> , the last fragments in the Corpus Juris Civilis and Consuetudines Feudorum
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Vaugh.	Vaughan's Reports
Vent.	Ventris' Reports
Vern.	Vernon's Reports
Ves. or Ves. sen.	Vesey's, sen., Reports
Ves. jun.	Vesey's, jun., Reports
Vin. Abr.	Viner's Abridgment
Vin. Supp.	Viner's Supplement
Voet	Voet's, John, Commentarii ad Pandectas
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W. R.	Weekly Reporter
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West	West's Reports
<i>White</i>	<i>White's Justiciary Court Reports</i>
White & Tud.	White and Tudor's Leading Cases
<i>Wight Elect.</i>	<i>Wight's (Alexander) Inquiry into the Rise and Progress of Parliament, chiefly in Scotland</i>
Willes	Willes' Reports
Will. Woll. & D.	Willmore, Wollaston, and Davison's Reports

# TABLE OF ABBREVIATIONS

xvii

Will. Woll. & H.	.	.	Willmore, Wollaston, and Hodges' Reports
Wils. Ch.	.	.	Wilson's Chancery Reports
Wils. Ex. Eq.	.	.	Wilson's Exchequer Reports
Win.	.	.	Winch's Reports
Wight.	.	.	Wightwicke's Reports
Wils.	.	.	Wilson's Reports
<i>Wils. and S.</i>	.	.	<i>Wilson and Shaw's Appeal Cases</i>
<i>Wilson</i>	.	.	<i>Dove Wilson on Sheriff Court Practice, 4th ed.</i>
Wm. Rob.	.	.	William Robinson's Admiralty Reports
Wms.	.	.	Williams, P., see Peere Williams
Y. B.	.	.	Year Books
Y. & C.	.	.	Younge and Collyer's Reports
Y. & C. C. C.	.	.	Younge and Collyer's Chancery Cases
Y. & J.	.	.	Younge and Jervis' Reports
Yelv.	.	.	Yelverton's Reports
You.	.	.	Younge's Reports





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1834 . . . . .	4 & 5 „	1866 . . . . .	29 & 30 „
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1837 . . . . .	7 Will. iv. & 1 Vict.	1868-9 . . . . .	32 & 33 „
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# GREEN'S ENCYCLOPÆDIA

OF

## THE LAW OF SCOTLAND

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**Election Petition (Parliamentary).**—Previous to 1868 a parliamentary election could only be questioned by the Election Committees of the House of Commons, instituted by 10 Geo. III. c. 16. This jurisdiction has been transferred from the House of Commons to the Queen's Bench Division in England and Ireland, and to the Court of Session in Scotland, by the Parliamentary Elections Act, 1868, 31 & 32 Vict. c. 125. The tribunal introduced by that Act consisted originally of one judge, but in 1879 the number was increased to two in terms of 42 & 43 Vict. c. 75, and two judges always sit now in election cases. An election may still be questioned in the House of Commons by means of motion, but this cannot be done until after the time for presenting a petition or questioning an election before the appropriate Court has expired. The House may at any time determine the validity of an election, and the right of declaring any particular seat vacant is specially reserved to it by sec. 38 (3), 31 & 32 Vict. c. 125. It may also decide questions as to the disqualifications of its members, as, for instance, the case of a convicted felon (*O'Donovan Rossa*, 1870; *Michael Davitt*, 1882), an escaped convict (*John Mitchell*, 1875), disqualification under 22 Geo. III. c. 45, relating to contractors (*Sir S. Waterlow*, 1869), contumacy (*Charles Bradlaugh*, 1882), and cases of misconduct and misdemeanour (*Verney* and *De Cobain*, 1891).

The Acts regulating the conduct of an election petition in Scotland are—  
31 & 32 Vict. c. 125 (Parliamentary Elections Act, 1868).

Parliamentary Petition Rules issued by Court of Session in 1868 and 1869.

46 & 47 Vict. c. 51 (The Corrupt Practices Prevention Act, 1883).

*Who may Petition.*—Any person may petition who

- (1) Voted or had a right to vote at the election to which the petition relates; or
- (2) Claims to have had a right to be returned or elected at such election; or
- (3) Alleges himself to have been a candidate at such election (31 & 32 Vict. c. 125, s. 5).

The onus is upon the respondent to show that the petitioner is not qualified (*Walsall*, 1892, Day's El. Cas. 2). As to the meaning of "voted"

or had a right to vote," see *Walsall, supra*, and *Youghal*, 1869, 1 O'M. & H. 291. The fact that a person "voted" is, it is submitted, not in all cases sufficient qualification to be a petitioner. He might be a paid agent, who is prohibited from voting, or guilty of bribery, or some such offence, and whose vote therefore would be null. More persons than one may be petitioners; and this course is prudent, because the petition will continue even though one of them may be disqualified.

On the other hand, too many are a disadvantage, as the consent of all requires to be obtained at some stages of the procedure, *e.g.* the withdrawal. If the petitioners are "men of straw," that may materially affect the question of costs (*Stepney*, 1892, Day's El. Cas. 81, 124; 4 O'M. & H. 183).

*Who may be Respondents.*—The respondents may be

- (1) The person or persons whose election or return is complained of; or
- (2) The returning officer.

An unsuccessful candidate cannot be made a respondent against his will (*Lovering*, 1875, L. R. 10 C. P. 711). Where a defeated municipal candidate was *de facto* in office, and refused to resign, he was properly made a respondent (*Yates*, 1874, L. R. 9 C. P. 605). All the successful candidates need not be called, although the matters complained of may to some extent affect each (*Line*, 1885, 14 Q. B. D. 548). A petition may be presented against the return of a member after his death (*Tipperary*, 1875, 3 O'M. & H. 19; *Morton*, 1875, Ir. Rep. 9 C. L. 173). If the petitioner is found entitled to the seat, a second petition to have him unseated is incompetent (*Waygood*, 1869, L. R. 4 C. P. 361: cf. *Sterens*, 1870, L. R. 6 C. P. 147).

The returning officer may be a respondent when his conduct is complained of (31 & 32 Vict. c. 125, s. 51). If no charge is made against him in the petition, no evidence is allowed to be led to implicate him (*Tamworth*, 1869, 1 O'M. & H. 77). It is not a proper charge against him that he gave an erroneous opinion in law regarding a nomination or a ballot paper (*Harmon*, 1880, 6 Q. B. D. 323; *Cirencester*, 1893, Day's El. Cas. 3). There must be an imputation of misconduct, negligence, or gross failure of duty (*Warrington*, 1869, 1 O'M. & H. 42; *Hackney*, 1874, 2 O'M. & H. 77; *Athlone*, *ib.* 186; *Mayo*, *ib.* 191; *Drogheda*, *ib.* 201; *Renfrew*, *ib.* 213; *Greenock*, 1892, Blair, *Elect. Manual*, 402; *South Edinburgh*, 1895, not reported).

A new respondent cannot be admitted in place of the returning officer. If before the trial the respondent dies, or is summoned to Parliament as a peer, or if the House of Commons has resolved that his seat is vacant, or if he does not intend to oppose the petition, notice of such event having been given by publication in a newspaper, and by leaving a copy with the returning officer and principal clerk, any person entitled to be a petitioner may, within ten days after such notice has been given, or such further time as the judges may allow, apply to be admitted as a respondent, either with the respondent, if there be a respondent, or in the place of the respondent (31 & 32 Vict. c. 125, s. 38; Rules 30, 31, and 32, 1868). Not more than three persons can be so admitted (s. 38).

*Grounds of a Petition.*—The usual ground is that corrupt or illegal practices existed at the election. But any matter which, if proved, would avoid the election, is also a good ground; the disqualification of a candidate, miscount of ballot papers, improper closing of poll, intimidation spiritual or by violence, double return or no return.

*Time for Petitioning, and Amendment of Petition.*—An election petition

founded on any ground other than that of *illegal practices* must be presented within twenty-one days after the return has been made to and reached the hands of the Clerk of the Crown (31 & 32 Vict. c. 125, s. 6; *Hurdle*, 1874, L. R. 9 C. P. 435). If there is a specific averment of payment of money *since the time of the return*, and in pursuance of corrupt practices at the election, it may be presented within twenty-eight days after the date of the payment (31 & 32 Vict. c. 125, s. 6; *Kidderminster*, 1874, 2 O'M. & H. 172; *Southampton*, 1869, 1 O'M. & H. 223; *Gubway*, *ib.* 304; *Brecon*, 1871, 2 O'M. & H. 43).

Where the election is questioned upon an allegation of an *illegal practice*, the petition must be presented before the expiry of fourteen days after (1) the day on which the returning officer receives the return and declarations respecting the election expenses of the member to whose election the petition relates; or, (2) the day on which the last document was received, where the returns and declarations are received on different days; or, (3) after the date of an authorised excuse (if any), and, if more than one has been allowed, after the date of the last one (46 & 47 Vict. c. 51, s. 40 (1) a, (4) a, b).

If there is a specific allegation of payment of money, or some other act to have been done *after the date of the return of expenses*, made in pursuance of the illegal practices alleged in the petition, it may be presented within twenty-eight days after the date of such payment or act (46 & 47 Vict. c. 51, s. 40). In calculating the days, Sundays, Christmas Day, Good Friday, and days of public fast and thanksgiving are not counted (31 & 32 Vict. c. 125, s. 49; 46 & 47 Vict. c. 51, s. 40 (5); *Peace*, 1869, L. R. 4 C. P. 235). The required number of days is computed exclusive of the first and inclusive of the last day. If the last day for lodging falls on a holiday, delivery to the principal Clerk of Session of either Division at his private address would probably be sufficient, on the analogy of No. 4 of the English Rules of 1875. A certificate or some definite record of the precise time of lodging ought to be made, and put into the process as soon as the holidays expire.

A petition brought under the 1868 Act, *i.e.* one alleging some ground other than illegal practices, may be amended to include averments of illegal practices, if such amendment is made within the time prescribed by the 1883 Act, s. 40, subs. 2, for raising a petition dealing with illegal practices (or of an illegal payment, *Buckrose*, 1886, 4 O'M. & H. 116). With this exception, a petition cannot be amended to introduce new matter if the time for presenting a petition with such a charge has expired. A slight amendment to cure a technical error or to remove a small discrepancy between the evidence and the record, may possibly be allowed. In such matters the election judges have no greater powers than the Divisions (*Birkbeck*, 1886, 2 T. L. R. 273; *Youghal*, 1869, 1 O'M. & H. 295). After that time no amendment would be allowed so as to include a new charge. Amendment of particulars founded on a substantive charge in the petition is competent. When a petitioner claims the seat, a re-criminatory petition is competent to the respondent, and arises naturally in consequence of the petitioner's claim. This right cannot be defeated by the petitioner, *after the time for presenting a petition has expired*, striking out his claim to the seat (*Aldridge*, 1876, 1 C. P. D. 410). The proper course is to carry out the provisions relating to withdrawal: if that cannot be done, to give notice to the respondent that no evidence will be tendered in support of the claim, and that it will not be insisted in. The petition must be signed by all the petitioners (31 & 32 Vict. c. 125, s. 6).



*Form of a Petition, and how presented.*—The petition is drawn as nearly as possible in the form of Sched. B annexed to the Rules of 1868. The facts are stated articulately in the form of a condescendence. The prayer is given in the schedule.

In Scotland, a petition is presented to either Division of the Court of Session (31 & 32 Viet. c. 125, s. 58 (1)), by lodging it during office hours with the principal Clerks of either Division (Rule 1, 1868). The Clerk marks the date when received, and sends a copy of the petition to the returning officer, and the names of the petitioners and respondents, as well as the names and addresses of the agents. All these particulars require to be published by the returning officer (Rule 15, 1868; s. 7 of the Act 1868). A petitioner may be his own agent, and the rules applicable to agents apply to him (Rule 12).

Objections to relevancy, or competency, or on account of want of specification in a petition are presented by note to the Division to which it is boxed (*Irwin*, 1874, 1 R. 834; *Christie*, 1869, 7 M. 378.) So also application for leave to amend, under sec. 40, subsec. 2, of the Act of 1883, must be made to the Division, and not to the election judges (*Hood*, 1896, 23 R. 4).

*Service.*—Service may be made upon respondent's agent, if any, by delivery of a copy, or by post, so that it be received within the prescribed time, *i.e.* five days (Rules 5, 13). In other cases service must be made personally on the respondent. If this cannot be done, application supported by affidavit showing what has been done, may be made to the election judges, or to one of them, or in vacation to the Lord Ordinary on the Bills (Rule 28), not later than five days after the petition has been presented, to dispense with personal service, or to obtain such other order as may be thought just (Rule 13). Service may be accepted at once, and the *inducie* of five days dispensed with, if parties are anxious to proceed hurriedly, as for example at a recount (*Greenock*, 1892, and *South Edinburgh*, 1895, not reported). But the requisites for security must be complete. If the conduct of the returning officer is impugned (*e.g.* in a recount), he is deemed to be a respondent (s. 51, 31 & 32 Viet. c. 125), and, it is submitted, service must be made on him the same as on any other respondent, within five days of the presentation of the petition, in terms of sec. 8, *ib.* If another petition is raised, provision is made for it being bracketed along with the first and the two heard together; and the date of the last one prevails (s. 23, Act of 1868). In *Greenock* (Blair, *Elect. Manual*, p. 404) and *South Edinburgh*, recounts were held before the prescribed time for raising another petition had expired.

*Security.*—Within three days the petitioner requires to find security for £1000, and within five days notice of the nature of the proposed security must be served on the respondents, as well as a copy of the petition (Rules 3, 4, 5, 8, 1868). However many respondents there may be, one security of £1000 is enough (*Hereford*, 1880, 49 L. J. Q. B. 686), and under no circumstances can more than that sum be demanded (*Pease*, 1869, L. R. 4 C. P. 235; *Thomas*, 1869, 19 L. T. 498). Security offered may be by bond or deposit. All objections to the security must be in writing, and are heard and decided by the principal Clerk within five days from the date of service of the petition. If the security offered is unsatisfactory, the additional deposit requires to be made within five days from the deliverance of the Clerk, during which time an appeal may be taken to the judges, or either of them (Rules 6, 7, 8). If no security is forthcoming, the petition drops.

*How Petition proceeds.*—All election petitions proceed, except where a question of law is raised for the determination of the Court by a special case, before two judges placed on the *rota* for election cases in each year (42 & 43 Viet. c. 75, s. 2). The *rota* formerly consisted of two judges: it is now increased to four by an order of Court signed by the Lord President and dated 15 Oct. 1880. Two judges are necessary for the actual hearing of the petition, for consideration of an application to withdraw, and for preparing the certificate to be sent to the Speaker as the result of the petition; all other applications, orders, etc., may be made or done by, to or before, one judge (s. 2, *supra*); and in vacation, in the absence of the election judge, by the Lord Ordinary on the Bills (Rule 28). Apparently the only jurisdiction the Divisions have during session in election petitions is in matters of competency and applications for leave to amend (*Hood*, 1896, 23 R. 4). Application in session for a recount ought to be made to the election judges or judge. In vacation the Lord Ordinary on the Bills, in *Greenock* and *South Edinburgh*, granted authority to proceed with the recount without consulting the election judges, who were absent. In *Greenock* (*Blair, Elect. Manual*, 402), the election judges fixed the date of trial, and the Lord Ordinary on the Bills a fortnight previous to the date so fixed authorised the parties to open and inspect the sealed packets. The result of this examination was proved before the election judges at the diet, and they decreed in accordance therewith, viz. that the petitioner had been duly elected.

It is not necessary at any time to ask the Division to remit the petition to the election judges. Although lodged with the Division Clerks, it is not a Division process in the ordinary sense: it goes automatically to the Election Court (*Hood*, 1896, 23 R. 4). Objection to Auditor's report in dealing with the returning officer's account of expenses is not procedure under the Parl. Pet. Act of 1868, or its accompanying Rules, but under the Returning Officers' Act of 1886: and the proper Court to try such questions consists of the four judges on the *rota* (*Ivory*, 1896, 33 S. L. R. 104, 311).

The time and place of trial is fixed by the election judges, and notice thereof is sent by the principal Clerk to petitioner, respondent, and returning officer fifteen days before the day appointed for trial. This notice must be published by the returning officer as soon as he receives it (Rule 17). If a postponement takes place, notice of the new diet fixed must be given in the same way as for the first diet (Rule 19). When a second petition has been raised, it is bracketed with the first and the two heard together, the date of the later petition overruling the former (s. 23, Act of 1868).

The place of trial is usually in the county or burgh to which the election relates. It may be elsewhere if the Court so order (31 & 32 Viet. c. 125, s. 11 (11)), e.g. removal on the ground of intimidation (*Sligo*, 1869, 1 O'M. & H. 300); where facts are admitted, and it is unnecessary to call witnesses (*Arch*, 1887, 18 Q. B. D. 548). Saving of expense is no ground of removal (*Cirencester*, 1893, 1 Q. B. 245), nor mere inconvenience (*Collins*, 1880, 5 C. P. D. 544).

*Abatement of Petition.*—An election petition abates by the death of the sole petitioner, or of the surviving petitioner, but not by the death of the respondent. If the respondent dies, another person may be substituted for him (*Tipperary*, 1875, 3 O'M. & H. 19). The Court or judge may, if they think fit, substitute another person as petitioner, provided new security for the same amount is given, and that the application is made within one month of the notice of the death, or such other time as the judge may allow

(31 & 32 Vict. c. 125, s. 37; Rule 29, 1868). The abatement of a petition does not relieve the petitioner of liability for costs previously incurred. The dissolution of Parliament brings a petition to an end (*Carter*, 1874, L. R. 9 C. P. 117); and where the respondent has been successful and the dissolution took place before the judge's report reached the Speaker, he will get his costs (*Marshall*, 1874, L. R. 9 C. P. 702). Notice of the death of the petitioner must be given by any person interested to the principal Clerk, who in turn notifies the returning officer and the respondent (Rule 29, *ib.*).

*Withdrawal of Petition.*—If it is desired to withdraw the petition, the petitioner or his agent must leave a signed notice of application for leave to withdraw with the principal Clerk, and copies (provided by the petitioner) are sent by the Clerk to the respondent and the returning officer. The petitioner must advertise at least once, and the returning officer give public notice, that such an application has been made (Rules 25 and 26, 1868).

The time and place of hearing the application is fixed by one of the judges, or, in his absence, by the Lord Ordinary on the Bills, who may hear and determine the same unless he reports the matter to the Division. One week must elapse after the notice of intention to apply has been given before the application can be heard (Rule 28). The application must be supported by the affidavits of all the parties to the petition, and their solicitors, that the withdrawal has not been brought about by a corrupt agreement (C. P. P. Act, 1883, s. 41). The affidavits must state also the reasons of withdrawal, and copies must be sent to the Lord Advocate, as public prosecutor, a reasonable time before the hearing. There are heavy penalties for corrupt withdrawal (s. 41, subs. 4. *ib.*; 31 & 32 Vict. c. 125, s. 35). In every case the Court reports to the Speaker whether in its opinion the withdrawal has been corrupt or not (s. 41, subs. 7; C. P. P. A., 1883). No leave to withdraw will be granted unless affidavits are lodged and the consent of all the petitioners is obtained. If it be withdrawn, the petitioner is liable to pay the respondent's costs (31 & 32 Vict. c. 125, s. 35).

Any person who might have been a petitioner may be substituted for the original petitioner, provided he has given notice in writing to the Clerk, within five days after the notice of the application of withdrawal has been published by the returning officer, that he intends to apply to be substituted at the hearing. Want of this notice does not defeat his right to apply at the hearing, but may cause postponement and subject him in costs (31 & 32 Vict. c. 125, s. 35; Rule 27).

The effect of these rules for withdrawal causes some trouble when the petitioner decides to withdraw at the last moment, or during the trial. Must the statutory enactments as regards notice, etc., be then carried out, necessitating at least a week's adjournment before the hearing for leave to withdraw can take place? In *Hartlepool*, 1869, 19 L. T. 821, the petitioner gave notice at the trial, and the Court held there must be adjournment, as the procedure was statutory and essential, and other persons might want to be substituted. See also *Brecon*, 1870, 2 O'M. & H. 33; while in *Gloucester*, 1880, 3 O'M. & H. 72, where there were two respondents and one had given notice that he did not intend to oppose, the other being still left, no adjournment was required, the petitioner simply saying that he offered no evidence against him.

*Non-opposition of Respondent.*—If the respondent does not intend to oppose the petition, he gives signed notice of his intention to the principal Clerk six clear days before the trial, and this is intimated by him to the



petitioner or his agent and to the returning officer. The latter must publish it in the place of election. The trial of the petition is thereupon postponed (s. 38, 31 & 32 Vict. c. 125; Rule 31). In *Gloucester*, 1880, 3 O.M. & H. 72, where notice by one respondent that he did not intend to oppose, was not given in due time, the trial proceeded; but in Scotland, it would appear that in such a case a postponement could be had under the terms of Rule 19.

*Special Case.*—A special case may arise in two ways. It may be ordered by the Court (*i.e.* either of the Divisions) upon application by any party interested, if it appears to the Court that the case raised by the petition can be conveniently stated as a special case. Its judgment shall be final. The application must be made to the Division to which, when sitting, the petition was presented, or to the Lord Ordinary on the Bills in vacation (31 & 32 Vict. c. 125, s. 11, subs. 16, s. 58; Rule 20, 1868). Or it may also arise where it appears to the judges, on the trial of the petition, that questions as to the admissibility of evidence otherwise require further consideration. The judges postpone the granting of the certificate until these questions are decided by the Division, on a special case stated and adjusted at the sight of the election judges (s. 12, *ib.*; Rule 22, 1868). No instance of a special case in an election petition is recorded in Scotland. In England they are common. For examples in England, see *Royse*, 1869, L. R. 4 C. P. 296; *Ryder*, *ib.* 559; *Harmon*, 1881, 7 Q. B. D. 369; *Davies*, 1874, L. R. 9 C. P. 720; *Northcote*, 1875, L. R. 10 C. P. 476).

When a division can conveniently be made between the facts and the law, the facts may be left to the petition, and the law decided in a special case (*Hereford*, 1869, 19 L. T. 702; *Salisbury*, 1869, 19 L. T. 528).

*Procedure in a Recount or Scrutiny.*—A recount is hardly a scrutiny in the proper sense. Nevertheless it may be useful to deal with a petition for a recount more in detail, inasmuch as such requests are by no means uncommon. A petition for a recount is unquestionably a petition complaining of “an undue return,” *i.e.* if it is stated relevantly. In *Renfrew*, 1874, 2 O.M. & H. 213, the competency of a recount was argued and admitted, and since then recounts have become general. In *Stepney*, 1886, 4 O.M. & H. 51, the Court indicated what kind of statements would justify a petition for recount. Mere curiosity or dissatisfaction with the result, or vague averments of carelessness on the part of the returning officer, ought not to be sufficient (*Stepney*, 1886, 4 O.M. & H. 50).

The Election Court, or the Lord Ordinary on the Bills in their absence, will, on application, order a recount to take place before some responsible person, *e.g.* the Clerk of Court, prior to the day fixed for trial (*Greenock*, 1892, Blair, *Elect. Manual*, 402; *South Edinburgh*, 1895). In *Stepney*, *supra*, the judge counted the papers himself. The result of the recount may be made to the Election Court, at the date fixed for trial, by way of evidence, or by joint minute, and decree given accordingly. See procedure and interlocutor in *Greenock*, Blair’s *Elect. Manual*, 402.

*Scrutiny*—is a critical examination of the votes given at an election, for the purpose of correcting the poll. There must be a scrutiny whenever the petition claims that the defeated candidate has been duly elected, and this happens most frequently when the majority is small. If the seat is claimed by the petitioner, the respondent is entitled to meet this claim with a *re-criminatory petition*, that is to say, he is not only entitled to defend his own return, but also to lead evidence with a view to show that, even if he himself



is unseated, the petitioner also is disqualified from being elected, and that the seat is vacant as regards each. Recriminatory evidence cannot be led if the petitioner withdraws his claim to the seat, when he has established that the respondent's election is void for corrupt practices (*Gravesend*, 1880, 44 L. T. 64, 3 O'M. & H. 81; *Thirsk*, 1880, 3 O'M. & H. 113; *North Durham*, 1874, 2 O'M. & H. 154). Leave to withdraw the petitioner's claim to the seat may be opposed by the respondent; and if leave is not given, the respondent may, it appears, go on with his recriminatory petition, in order to disqualify the petitioner on a subsequent election (*Clare*, W. & B. 143; *New Windsor*, 2 Peck, 188; *Coventry*, 1 Peck, 99). If the whole petition is withdrawn, the respondent cannot go into the recriminatory case (*Maldon*, 2 P. R. & D. 146). Ordinarily, leave to withdraw is not given (*Aldridge*, 1 C. P. D. 410; but see *Stroud*, 1874, 3 O'M. & H. 7).

The convenient practice is to inspect the ballot papers and counterfoils before the trial, and application for such leave is competent only to the "tribunal having cognisance of petitions complaining of undue returns" (*i.e.* the Election Court) (Rule 41, Ballot Act). But application to inspect the rejected ballot papers need not, apparently, be made to the election judges. In England a judge of the Supreme Court at Chambers is sufficient. The application must be supported by evidence on oath, or affidavits (Rules 40 and 41, Ballot Act). The other documents may be examined without order (Rule 42, Ballot Act; *James*, 1874, 43 L. J. C. P. 238).

In addition to "particulars" stated in the petition, there must be what are known as *scrutiny lists*, one lodged by the petitioner if he claims the seat, another by the respondent if he enters a recriminatory petition. Each list sets out the names of persons whose votes are objected to, and the objections to each voter. The lists must be delivered to the Clerk six days before the trial, and no evidence is allowed, except by leave of the Court, against votes or voters not included in the list (*Neill*, 1874, L. R. 9 C. P. 104; Rules 9 and 10, 1868). The six days are exclusive of Sundays, the day of trial, and the day of service (*Joyce*, 22 W. R. 655).

A scrutiny seldom stands alone. It is usually accompanied by general charges, say of bribery, against the opposite party. In England, the ordinary practice in such petitions is for the petitioner first of all to open his case on the general charges of corruption, then for the respondent to follow with his general charges against the petitioner; and the reason for this is, if both parties are disqualified a scrutiny becomes unnecessary. If one party is disqualified on the general charges, he may still proceed with the scrutiny, to show that his opponent was not duly elected (*York*, 1869, 1 O'M. & H. 213; *Southampton*, *ib.* 222; *Norwich*, *ib.* 8). As to variations of this procedure, see *Berwick*, 1880, 3 O'M. & H. 178; *Stepney*, 1886, 4 O'M. & H. 35.

In *Oldham*, 1869, 1 O'M. & H. 151, a scrutiny took place in an election where four candidates stood for two vacancies.

Votes given by the following persons are struck off on a scrutiny: Persons whose names are not on the register; persons whose names are, but are personally disqualified (35 & 36 Viet. c. 33, s. 7; *Stowe*, 1874, L. R. 9 C. P. 736); women; aliens (*Isaacson*, 1886, 17 Q. B. D. 54); lunatics; infants; peers; felons; persons guilty of corrupt or illegal practices at that or any other election within a prescribed time; paid agents; personators; so also votes which are given upon any ballot paper (1) which has not on its back the official mark, (2) on which votes are given for more candidates than the voter is entitled to vote for, (3) on which any identifying mark is written, (4) which is unmarked, and (5) which is void for uncertainty. As to what marks render a vote good or bad, see PARLIAMENTARY ELECTION. Votes may

be added as well as struck off, *e.g.* votes which have been tendered or rejected, or counted for one candidate although given to another (*Cirencester*, 1893, Day's El. Cas. 48).

If the judges differ as to a vote being struck off, it remains on; if as to a vote being put on, it remains off (*Berwick*, 1880, 3 O'M. & H. 178). Before objecting to a vote, it is as well to make absolutely certain that it was not given to the objector. In *Finsbury*, 1892, Day's El. Cas. 47, the petitioner in one morning succeeded in striking three votes off his own score.

Only the faces of the ballot papers were allowed to be seen in *Tyrrone*, 1873, 21 W. R. 627, and this was followed in *Stowe*, 1874, L. R. 9 C. P. 447. In neither *Stowe* nor *Tyrrone* was it alleged that votes improperly marked had been received. In *Berwick* (1880) the judge at Chambers, of consent of parties, ordered inspection of the counterfoils and all the ballot papers; and it is difficult to see how a scrutiny can be properly conducted without such an order.

*Evidence.—Particulars.*—Evidence need not be stated in the petition, but the Court or the election judges may, at the request of the respondent, order the petitioner within a certain time to lodge with the Clerk and serve on the respondent such "*particulars*" as may be necessary to prevent surprise at the trial. The particulars are really specified statements as to the acts of bribery, etc., personation, or illegal practices founded on in the petition. Particulars may be ordered to be delivered "so far as known" (*Maude*, 1874, L. R. 9 C. P. 165; *Lenham*, 1883, 10 Q. B. D. 293). No evidence except relating to the particulars is admissible without leave (Rule 1, 2, add. Rules, 1869). In *Hood*, 1895 (*Elgin*), 23 R. 171, particulars were ordered to be lodged not later than three weeks before the date of trial. In *Beal*, L. R. 4 C. P. 145, the time fixed for delivery was three days before the trial. In allegations of bribery and treating, it is necessary to set forth the places where the alleged acts were committed, and the form in which the bribery was effected (*Hood*, *supra*). Leave to amend the particulars to include new matter may, if circumstances demand it, be given by the Court (Rule 2, add. Rules, 1869; *Longford*, 1870, 2 O'M. & H. 7; *Harwich*, 1880, 3 O'M. & H. 60; *Wigan*, 1811, 4 O'M. & H. 1; *West Belfast*, *ib.* 106). But this is a very different kind of amendment from the amendment of a petition to include a new charge, or a new ground. Particulars are ordered to be struck out when no charge has been made in the petition under which they could properly be given. To allow such would be to allow the petitioner unduly to extend the scope of his petition (*Montgomery*, 1892, Day's El. Cas. 14).

*Diligence to recover Documents* is incompetent in an election petition (*Moore*, 1883, 10 Q. B. D. 290; *Wells*, 1880, 5 C. P. D. 546; *Hood*, 1895, 23 R. 171). But the judges may grant warrant to cite witnesses and havers in common form to attend the trial. If the witness thinks that the documents asked for in the warrant are altogether outside the scope of the inquiry, and such as the election judges would not call upon him to produce, he may act accordingly; but if, on the other hand, documents which might throw light on the proceedings are called for and he does not bring them, there may be a question of adjournment and a question of expenses (*Hood*, *supra*). See also, on the question of production of documents, *Windsor*, 1869, 1 O'M. & H. 5; *Bradford*, *ib.* 30; *Westminster*, *ib.* 193; *Tamworth*, *ib.* 76; *Salford*, *ib.* 126; *Northallerton*, *ib.* 167. The Court has jurisdiction to order the Post Office authorities to produce specified telegrams (*Bolton*, 1869 1 O'M. & H. 139; *Harwich*, 1880, 3 O'M. & H. 61; *Coventry*, 1869, 19 L. T. 742).

*Witnesses* are cited and sworn in the usual way, and the judges may compel the attendance of persons as witnesses who may appear to them to have been concerned in the election. Disobedience is contempt of Court. In general, the ordinary rules of evidence as to hostile witnesses, and as to discrediting or contradicting witnesses apply. Witnesses may be examined on commission if too ill to attend and the evidence is material (*Staleybridge*, 1869, 19 L. J. 703).

Witnesses are entitled to reasonable expenses, certified by the Clerk of Court (Rule 23), and the same applies to a witness called by the Court *ex proprio motu* (ss. 31, 34, 31 & 32 Vict. c. 125). The cost of witnesses in the first instance is paid by the party adducing them (Rule 23). Subject to the provisions of the 1868 Act, the election judges have all the powers and jurisdiction of a judge of the Court of Session sitting in a civil cause without a jury (s. 58 (15), Act of 1868).

*Certificate of Indemnity*.—A witness who truly answers all questions put to him is entitled to receive a *certificate of indemnity* from the Election Court (*Barrow*, 1886, 4 O'M. & H. 83; *Packard*, 1886, 54 L. T. 622), and any answer made by him is not admissible in any proceedings against him except for perjury (s. 59 (*a, b, ib.*)). It does not relieve him from the civil, political, judicial, or other incapacities which may follow, or be imposed on persons guilty of offences under the Corrupt Practices Act. Proceedings other than criminal, to enforce such incapacities, are quite competent (s. 38 (5), s. 59 (3), *ib.*). A certificate of indemnity may be granted to the respondent and his election agent, if called as witnesses (*Barrow*, 1886, 4 O'M. & H. 83; *Hexham, Rochester, and Walsall*, 1892, Day's El. Cas. 39). If a witness has not received a certificate, he may be prosecuted by the Lord Advocate or Procurator-Fiscal, if it appears that such witness has been guilty of an offence under the Corrupt Practices Act (s. 68 (3) (*c*), C. P. P. A., 1883).

*Relief*.—Although in the petition corrupt and illegal practices may be proved to have occurred at the election, it does not follow that the respondent will lose his seat. He may be able to get relief from the judges under sec. 22 of the Act of 1883; and in almost every case where the seat is claimed upon averments of corrupt and illegal practices, the respondent ought to be ready to lead evidence to show that he is entitled to relief under that section. The Court cannot grant relief when the candidate himself has been guilty of treating, undue influence, or illegal practices, or any or all of them, nor where his agents are proved guilty of bribery, personation, or instigating personation. But where treating, undue influence, or illegal practices have been committed by any of the agents other than the election agent, relief may be granted, provided the respondent satisfies the stringent conditions precedent to relief under sec. 22. In no case can relief be granted for bribery or personation.

Relief may be obtained also under sec. 23 to except an innocent act from being an illegal practice; and an authorised excuse for non-compliance with provisions as to return and declaration respecting election expenses under sec. 34; all of these are of vital importance to a candidate or respondent who has made mistakes in the course of the election.

Improper acts of the election agent can only be excused if they are inadvertent; and the application is made under sec. 23. If they do not come within that section, the candidate must suffer the consequences. For cases upon sec. 23, see Day's El. Cas. 74. See CORRUPT AND ILLEGAL PRACTICES.

*Public Prosecutor*.—The Lord Advocate is represented at the trial of a petition either by one of his Deputies or by the Procurator-Fiscal of the Sheriff Court of the district (s. 68, *ib.*). His function is twofold: to pro-



secute, if need be, any offender, and to protect the public interest by preventing the suppression of evidence likely to throw light upon the proceedings at the election. He has power to call witnesses (s. 43, subs. 2, C. P. P. A., 1883). In general, he has no right to cross-examine (*Stepney*, 1886, 4 O.M. & H. 37), or to address the Court upon the question as to whether a witness was guilty of an offence, unless he was in a position to prosecute him (*Buckrose*, 1886, 4 O.M. & H. 115). When the judge grants warrant for the apprehension or commitment of any person suspected of a corrupt or illegal practice, the case is reported to the Lord Advocate, so that such person may be tried before the High Court or the Sheriff, as the case may be. It is the duty of the Advocate-Depute, or, in his absence, the Fiscal, if it appears that an offence has been committed by any person who has not received a certificate of indemnity, to report the case to the Lord Advocate, so that such person may be tried before the proper Court, although no warrant may have been issued by the judges (s. 68 (3), *ib.*).

*Costs* of petitions usually follow event, and are taxed as nearly as possible according to the same principles as costs between agent and client in a Court of Session cause, and the Auditor does not allow any charges on a higher scale (s. 68 (17), C. P. P. A., 1883). When the account is taxed, it may be decerned for in the ordinary way, either by the election judges or by the Division (Rule 34, 1868: *Hood*, 1896, 23 R. 4). The public prosecutor's expenses are directed to be paid by the Treasury (s. 43 (8), *ib.*), unless for some reasonable cause the Court otherwise directs. In one case, *Kennington*, 1886, 4 O.M. & H. 95, the petitioner was ordered to pay the costs of the public prosecutor.

There are so many different circumstances regulating the question of costs, that it would serve no useful purpose to detail the cases dealing with that subject here. Reference may be made to Parker on *Elections*, 2nd ed., p. 567.

Constituencies where corruption has been general, and private individuals guilty of offences, may be ordered by the Court to pay the costs, either in whole or in part (s. 44, C. P. P. A., 1883).

*Report to the Speaker by Election Courts.*—The result of the trial is certified in writing to the Speaker. Where a charge of corrupt or illegal practices has been made, the judges, in addition to the certificate of their finding, must report, stating (1) whether any corrupt or illegal practice has been committed by or with the knowledge and consent of the candidate; (2) the names of persons who are guilty of such offences, and whether or not they have received certificates of indemnity; (3) and whether such offences prevailed extensively (s. 11 (13–15), Act 1868; s. 11 (14), C. P. P. A., 1883). The judges may, at the same time, make a special report to the Speaker exonerating a candidate in certain cases of corrupt and illegal practices by agents (s. 22, C. P. P. A., 1883), or allowing an authorised excuse for non-compliance with the statutory provisions as to the return and declaration respecting election expenses (s. 34 (1), *ib.*). See CORRUPT AND ILLEGAL PRACTICES, *RELIEF*. Before a person, not a party to the petition, nor a candidate on whose behalf the seat is claimed, is reported guilty of corrupt or illegal practices, notice must be given to him, and if he appears, opportunity must be given him of being heard personally, and of calling evidence to show why he should not be reported (s. 38, C. P. P. A., 1883). Such a person has no right to be heard by counsel or solicitor (*Mansel Jones*, 1889, 23 Q. B. D. 29); but the Court may in the exercise of its discretion allow this, as was done in *Hexham* and *Rochester*, 1892, Day's El. Cas. 78.

If the judges differ as to the subject of the report, they certify the difference and make no report on the subject on which they differ (42 & 43 Vict. c. 75, s. 2), and persons implicated are not affected (*Montgomery*, 1892, Day's El. Cas. 79). If they differ on a question of return or election, they certify the difference, and the member is returned (s. 2, *ib.*; *Down*, 1880, 3 O'M. & H. 123). If they determine that a member was not duly elected or returned, but differ as to the rest of the determination, they certify that difference and the election is void (s. 2, *ib.*). The judges may also make a special report to the Speaker on any matters arising in the trial on which they think the House of Commons ought to be informed (s. 11 (15), 31 & 32 Vict. c. 135: see *Bradford*, 1869, 1 O'M. & H. 31; *Bridgewater*, *ib.* 112; *Norwich*, 1875, 3 O'M. & H. 17; *Gloucester*, *ib.* 75).

In every case where there has been withdrawal of a petition, the Court reports to the Speaker whether in its opinion the withdrawal was the result of a corrupt arrangement, or in consideration of the withdrawal of any other petition; and if so, the circumstances attending the withdrawal (s. 41 (1-9), C. P. P. A., 1883).

The House of Commons enters the report or reports in its journals, and gives the necessary directions for confirming or altering the return, and for issuing a new writ, or for carrying the determination into execution, as the case may be.

*Civil Action for Penalties.*—Persons guilty of offences under the C. P. P. Acts are liable to certain penalties. See CORRUPT AND ILLEGAL PRACTICES. There may be, however, in some circumstances, civil suits for penalties at the instance of any persons who choose to bring them. A candidate or agent who gives cockades to a voter or inhabitant of the constituency exposes himself to an action for the recovery of two pounds and costs (s. 7, 17 & 18 Vict. c. 102; C. P. P. A., 1883, s. 66, and Sched. V.). So also, penalties may be sued for and under sec. 33 (5) of the Act of 1883. That section provides that if the return and declaration of election expenses are not transmitted within the time limited for that purpose, the candidate shall not sit or vote in the House of Commons until the return has been transmitted, or until an authorised excuse for failure has been allowed. If he does sit and vote, he shall forfeit £100 a day for every day he sits and votes to any person who sues for the same. This action is rare; two instances only can be recalled, one where the late Rt. Hon. W. H. Smith was threatened, if not actually sued (not reported), and the other at present pending (March 1897) in the English Courts against Dr. Clark, M.P. for Caithness, and at the instance of a solicitor who was unsuccessful in enforcing a guarantee given by Dr. Clark for the expenses of a candidate in another election. In Dr. Clark's case the action could not be raised in Scotland, as in the absence of arrestment to found jurisdiction, he was not amenable to the jurisdiction of the Scotch Courts. (On this question of penal actions and the rights of a common informer generally, see *Dyer*, 1 Ex. 152; *Lewis*, 10 Ex. 86; *Robinson*, 7 Q. B. D. 465; *Bradlaugh*, 8 App. Ca. 354; *Brighton Aquarium*, 1879, 3 Ex. Div. 137; *affd.* 4 Ex. Div. 107; see also *Grosset*, 1753, 5 Brown's Parl. Cas. 527.) Wilful misconduct on the part of the returning officer, presiding officer, or clerk, renders them liable to a penalty suit for a sum not exceeding £100 (s. 61 (1), C. P. P. A., 1883; s. 11, Ballot Act, 1872). For penalties against assessors or other officials for neglect of duty under the Registration Acts, see secs. 38, 39 of 24 & 25 Vict. c. 83 (The County Voters Act, 1861).

A returning officer who wilfully delays, or neglects, or refuses duly to make a return of any person who ought to be returned to serve in Parliament may, if it is determined by election petition that such person was entitled to be returned, be sued by him in the Court of Session for double the amount of damages sustained by reason thereof, with expenses. But the action must be raised within a year after the date of commission of the act alleged, or within six months after the trial of the petition (s. 48, 31 & 32 Vict. c. 125).

Any sheriff or sheriff-substitute, sheriff clerk or town clerk, who wilfully contravenes the provisions of 2 & 3 Will. IV. c. 65 (Reform Act), may be sued in the Court of Session by any aggrieved party for £500, without prejudice to such party's right against the returning officer, to recover damages at common law or statute for a false return.

The action must be raised within four months after the offence, and written notice must be given to the defender at least one month before the action is raised (s. 38, 2 & 3 Will. IV. c. 65).

An action brought to recover penalties proceeds by summons in the Outer House in the same way as if it were for a sum of money in an ordinary petitory action; and if the sum concluded for is less than £25, it must, it is submitted, be brought in the Sheriff Court.

As to penalties for sitting and voting without taking the oath of allegiance, see *Bradlaugh, supra*, and 1885, 14 Q. B. D. 667, and cases therein quoted.

[Blair's *Election Manual*; Nicolson on *Elections*; Rogers on *Elections*; Parker on *Elections*; Mattinson and Macaskie's *Corrupt Practices*.]

See CORRUPT AND ILLEGAL PRACTICES; PARLIAMENTARY ELECTION.

**Election Petition (Municipal, County Council, etc.).**—All election petitions, other than parliamentary, are regulated by the Elections (Seot.) (Corrupt and Illegal Practices) Act, 1890 (53 & 54 Vict. c. 55), and the accompanying rules contained in the Act of Sederunt of 8 Nov. 1890. In this Act "election" means an election to a corporate office, *i.e.* the office of county councillor, town councillor, police commissioner, member of parochial and school board, and parish councillor (s. 2). Subject to the provisions of the Act and the rules made under it, the principles, practice, and rules observed in the case of parliamentary petitions, and in particular the principles and rules with regard to agency and evidence, and to a scrutiny, and to the declaring any person elected in the room of any other person declared to have been not duly elected, are to be observed so far as may be in petitions under the Act of 1890 (s. 47 (2)).

*Grounds of a Petition.*—There are four grounds on which an election may be questioned: (1) General corruption, (2) corrupt or illegal practices on the part of the candidate or his agents, (3) incapacity of the candidate elected, and (4) irregularities in the votes which, upon a scrutiny, would reduce the majority to a minority (s. 30 (1)). Under the last head would fall all such grounds as intimidation, rioting, miscount, improper closing of the poll, etc. An election shall not be questioned on any of these grounds by way of reduction or suspension, or by any other form of process other than an election petition (s. 30 (2)). If an election is challenged on other grounds, it may be by reduction or declarator, or some other process, but it must be brought within one month from date of election (16 Vict. c. 26, s. 5; *Drew*, 1854, 17 D. 51; *Thom*, 1885, 12 R. 701).



*Petitioners.*—A petition may be presented by: (1) four or more persons who voted or had a right to vote at the election, or (2) a person alleging himself to have been a candidate at the election (s. 31 (1)).

If the sole, or sole surviving, petitioner die, any person qualified as above may apply to the Court to be substituted as a petitioner within twenty-one days from the publication of the notice of death by the Sheriff Clerk (s. 39 (3); A. of S. s. 11).

*Respondents* may be one or more of those persons whose election is questioned, or the returning officer, if his conduct is complained of (s. 31 (2)). Two or more candidates may be made respondents to the same petition, and their cases may be tried at the same time, and the petition is deemed to be a separate petition against each (s. 34). New respondents may be substituted in the following circumstances: If before the trial a respondent, other than the returning officer, dies, resigns, or ceases to hold office, or gives notice that he does not intend to oppose, a new respondent or respondents, not exceeding three, may be substituted, provided that the application to be so substituted was made within ten days from the notice of the change of circumstances given by the Sheriff Clerk (s. 40; A. of S. s. 12). The fact that the respondent has ceased to hold office does not preclude the right of the petitioner, if so advised, to proceed with the petition (s. 36 (11)).

*To whom Presented.*—The petition is drawn in the form of an ordinary Sheriff Court petition, with condescendence and note of pleas annexed (A. of S. s. 1), and is presented to and tried in the Sheriff Court of the county in which the electoral area, or the largest part of it, is situated. The presiding judge is the Sheriff, and not the Sheriff-Substitute (s. 35). But the Sheriff-Substitute may hear and dispose of questions concerning the withdrawal or substitution of respondents (s. 40), abatement (s. 39), security (s. 33), time for presenting (s. 32), time for lodging and paying claims, or allowing excuse for failure to lodge the return and declaration of expenses (s. 25). The Sheriff Court has the same powers and privileges as the Election Court in parliamentary petitions, except that any fine or committal made by the Sheriff Court may be reviewed by the Court of Session, or in vacation by the Lord Ordinary on the Bills (s. 35 (2)). The Sheriff Clerk is the Clerk of Court (A. of S. s. 5). A question of law arising out of the petition may, if the Sheriff think necessary, be submitted to the Court of Session to decide (s. 36 (8)); and if the case raised by the petition may be conveniently stated in a special case, it may, on application, be so ordered to be stated by the Sheriff, and remitted to the Court of Session to decide (s. 36 (7)).

The petition is lodged with the Sheriff Clerk, who transmits it to the Sheriff. Thereupon the Sheriff fixes the amount of security to be given by the petitioner, and, if he thinks fit, orders answers within a specified time after service.

*Service* is made either personally or by registered letter sent to the known address of the respondent. It must be delivered within five days after the presentation of the petition (A. of S. s. 1).

*Time for Petitioning.*—The petition must be presented within twenty-one days after the election, but in certain cases of corrupt or illegal practices a longer period is allowed.



If the complaint is a *corrupt practice or illegal practice*, done or made by the candidate himself, or with his knowledge *since the election*, presentation must be within twenty-eight days after the date of the alleged offence.

If the complaint is an *illegal practice* other than above, it must be presented within fourteen days after the return and declaration of the candidate's expenses has been received (s. 32 (1) ).

*Security for Costs.*—As soon as the petition is lodged, the Sheriff fixes the security to be given by the petitioner. It may not exceed £500, and whatever sum is fixed, it must be found by the petitioner within three days. Within five days the petitioner must serve the petition on the respondent, as also a notice of the security demandable. Objections to the nature of security offered by the petitioner may be made by the respondent within five days after service, and are heard and decided by the Sheriff Clerk (s. 33 (1-7); A. of S. ss. 1 and 2). Notice of the nature of the proposed security must be served on the respondent, otherwise the petition will be dismissed (*Hunter*, 1896, 3 S. L. T., No. 418; cf. also *Williams*, 1879, 5 C. P. D. 135, on the construction of a similar provision in the Cor. Pract. (Municip. Elect.) Act, 1872, s. 13, subs. 4. The petition was dismissed there also).

*Notice and Place of Trial.*—Notice of the time and place fixed for the trial by the Sheriff is affixed by the Sheriff Clerk to the notice-board at his principal office not less than seven days before the date of trial. He must also send copies of the notice to the petitioner, the respondent, the Lord Advocate, and the returning officer not less than seven days before the trial (s. 36 (1); A. of S. s. 4). The returning officer on receiving his notice must publish it by advertisement in the area for which the election questioned was held (A. of S. s. 4). The place of trial is the Sheriff Court, but some other convenient place within the sheriffdom may be appointed.

*Amendment.*—It is competent to amend a petition, raised within twenty-one days of the return, by introducing averments charging corrupt or illegal practices committed since the election; but such amendment can only be made with leave of the Court, and must be made within the time specified for raising a petition in such cases after the date of the alleged corrupt or illegal practice (s. 32 (2) (3) ). But the Sheriff has also power at any stage to allow amendment, subject to conditions as to expenses, provided that no amendment shall alter the ground of the petition, except so far as consistent with the terms of sec. 32 (2) (3), above narrated (A. of S. s. 3).

*Withdrawal* is only competent by special permission of the Court on application by minute (s. 38). Notice of the application must be made to the Lord Advocate and the returning officer, the latter of whom must publish the notice on receipt. The Sheriff fixes a diet of hearing not sooner than eight days from the date of his interlocutor, and six days before the diet the petitioner himself must give public notice of his application to withdraw, the date of the hearing, and also that any other persons may apply to be substituted as petitioners. Before leave is granted, affidavits by all the parties to the petition, and their agents, that no corrupt bargain has been entered into, must be produced, unless dispensed with by the Sheriff (s. 38 (4) (13) (14); A. of S. s. 10). Copies of the affidavits must be sent to the Lord Advocate, and he or one of his deputies may appear and object to the withdrawal (s. 38 (8)).

If the Sheriff thinks the withdrawal has been corrupt, he may order the original security to remain as security for any substituted petitioner. If not, then the substituted petitioner finds new security in the usual way (s. 38 (9) (10)). No petition shall be withdrawn without the consent of all the petitioners (s. 38 (13)); and if a petition is withdrawn, the petitioner is liable to pay the expenses of the respondent (s. 38 (12)).

When notice of withdrawal has been given, or that the respondent does not intend to oppose, or of the abatement of the petition by death, or of the occurrence of any event mentioned in sec. 40 of the Act, after the notice of trial has been published, the Sheriff Clerk must give public notice in a local newspaper that the trial will not proceed on the day fixed (A. of S. s. 14).

*Abatement.*—A petition abates by the death of the sole petitioner, or of the survivor of several petitioners. Such abatement does not affect the liability of the petitioner to pay costs previously incurred (s. 39). New petitioners may be substituted in such a case. See *Petitioners, supra*.

*Scrutiny Lists—Particulars.*—When a petitioner claims a seat for an unsuccessful candidate he must, five days before the trial, send to the Sheriff Clerk and to the opposite party a list of the votes objected to, and of the objections to each vote; and if a respondent intends to prove that the person for whom the seat is claimed was not duly elected, he shall in like manner send to the Sheriff Clerk and to the petitioner a list of the objections on which he intends to rely (s. 36 (10); A. of S. ss. 7, 8). Evidence given is confined to the votes specified in the list, except with leave of the Sheriff, granted upon such terms as to amendment of list, postponement of trial, and costs as he thinks just. Nothing in the Act itself or Act of Sederunt is said about “particulars.” In parliamentary election petitions they are specially provided for by the additional rule of 1869, and it seems only reasonable that they should be ordered here when circumstances demand them.

*Procedure at Trial of Petition.*—The petition proceeds *de die in diem* but adjournment of time and place is competent if the Court thinks desirable. Evidence is taken in shorthand, and the expenses are in the first instance to be paid by the petitioner (s. 36 (12), A. of S. s. 5). At every petition the Lord Advocate is represented by one of his deputies, or by the Procurator-Fiscal (s. 41).

*Determination of the Court.*—At the conclusion of the trial, the Court must determine—

(1) Whether the person whose election is complained of was duly elected; or

(2) Whether any other person was duly elected in his place; or

(3) Whether the election was void.

The determination is final to all intents as to the matters at issue on the petition (s. 36 (5)).

If a charge is made of corrupt or illegal practices, the Court must determine—

(1) Whether any corrupt practice was committed with the knowledge of the candidate.

(2) Whether any corrupt practice was committed by the agents (s. 4).

(3) The names of all persons proved guilty of any corrupt practice (ss. 6, 42).

(4) Whether corrupt practices extensively prevailed (s. 5).

(5) Whether any candidate or his agent was guilty of an illegal practice (s. 12).

(6) Whether illegal practices prevailed so extensively as to affect the result (s. 36 (6) (*a, b*)). Persons appearing to the Court to be guilty of the offence of a corrupt or illegal practice are given an opportunity of being heard in their defence (42 (4)).

*Witnesses.*—The Court may order in writing any person to appear and give evidence. Refusal to obey is contempt of Court. The Court may *ex proprio motu* call any witness who has been cited but not examined.

Expenses of witnesses are certified by the Court, and allowed according to the ordinary scale in civil causes (s. 37), and in the first instance are paid by the adducing party (A. of S. s. 9). The respondent may give evidence to show that the petitioner or other person who claims the seat was not duly elected (s. 36 (10)).

Diligence for the recovery of documents has been granted and refused. The practice is not settled, but it is submitted that the rule in parliamentary elections not to allow a diligence should be followed. See ELECTION PETITION (PARLIAMENTARY)—*Diligence to recover Documents*.

*Relief* may be had for the consequences of an illegal act (not bribery or personation) under secs. 23, 24, and 25 of the Act of 1890. The circumstances under which relief is granted in these elections are very similar to the circumstances in parliamentary. See CORRUPT AND ILLEGAL PRACTICES: ELECTION PETITION (PARLIAMENTARY).

Applications under secs. 23 and 24 are competent only to the Sheriff (s. 35 (1)); under sec. 25, for an authorised excuse for failure to lodge return and declaration of expenses, may be made to the Sheriff-Substitute (s. 35 (3)).

*Relief under Sec. 23.*—If an Election Court finds that a candidate has been guilty by his agents of treating or undue influence, or of an illegal practice, but (1) that the offence was committed without the sanction or connivance of the candidate, (2) that all reasonable means were taken to prevent such offences, (3) that the offence was trivial and unimportant, and (4) that in all other respects the election was free from corrupt and illegal practices on the part of the candidate and his agents,—then his election shall not be void, nor shall he be subject to any incapacity.

*Relief under Sec. 24.*—If application is made to an Election Court, and it is shown that any illegal practice, payment, employment, or hiring arose from inadvertence, or accidental miscalculation or other reasonable cause, and not from any want of good faith, and that such notice of the application has been given as the Court thinks fit, the Court may order such act to be an exception from the consequences following upon illegal practices, etc., under the Act.

*Authorised Excuse under Sec. 25 (7).*—If the candidate applies to the Court and shows that his failure to make the return and declaration of election expenses, or that any error or misstatement therein has arisen by reason of his illness or absence, or of the absence, death, illness, or misconduct of any agent, clerk, or officer, or by reason of inadvertence or other reasonable cause, and not through any want of good faith on the part of the applicant, the Court may make an order for allowing the authorised excuse. And this order shall relieve the applicant from the consequences which otherwise would have followed.



As to interpretation of these provisions occurring in the Acts relating to parliamentary elections, which are almost identical in terms, and cases decided thereon, see CORRUPT AND ILLEGAL PRACTICES—*Relief*.

*Prosecution of Offenders.*—At the trial, the Lord Advocate is represented by one of his deputies or by the Fiscal. If the Sheriff grants warrant for the apprehension of, or commits, any person suspected of being guilty of a corrupt or illegal practice, a report shall be made to the Lord Advocate, that such person may be tried as he may direct.

All offences under the 1890 Act are prosecuted at the instance of the Lord Advocate, and, if tried in the Sheriff Court, are tried by the Sheriff, and not the Sheriff-Substitute (s. 41). Subject to the provisions of the Act of 1890, the procedure for the prosecution of offenders, including the grant to a witness of a certificate of indemnity, shall be the same as if the offence had been committed in reference to a parliamentary election (s. 49).

*Expenses*, as a general rule, follow the event, but the Court has large discretion (s. 42 (1)). If the expenses are not paid by the petitioner when so ordered, within three months after demand, the respondent may do diligence upon the bond of caution or other security lodged (s. 42 (2)).

If corrupt practices extensively prevailed, the constituency may be ordered to pay the costs, in whole or in part. So, also, any individual who has been proved to have extensively engaged in, or encouraged, corrupt practices at the election, may have to pay costs, in whole or in part (s. 42 (3) *a, b*); and any person found guilty of a corrupt or illegal practice may be made liable for the expenses of any proceeding relating to the offence (s. 42 (4)). Expenses given against a county, burgh, school, or parochial board are paid out of the general purposes rate, police assessment, school or poor rate, as the case may be (s. 42 (5)). Expenses are taxed by the Sheriff Court Auditor on the higher scale in the table of fees sanctioned by A. of S. 4 Dec. 1878 (s. 42 (7), A. of S. s. 17). The Sheriff's expenses are paid out of the rates (s. 43), and the expense of publishing notices, etc. by the Sheriff Clerk form part of the general costs. He is also entitled to a fee of two shillings for each copy of a notice or intimation sent out, which also forms part of the general costs (A. of S. s. 16).

*Provision as to a New Election on the Seat being declared Vacant.*—Where an election has been declared void, and no other person declared elected in place of the respondent, a "new election shall be held to supply the vacancy in the same manner as in a casual vacancy" . . . (s. 45). Casual vacancies in county councils, town councils, etc., are filled up by the votes of the existing members, and apparently this course is the one intended by sec. 45, although the words "a new election shall be held" occur, and the last part of the section rather suggests an election by the public. At anyrate, in *Marshall*, Edinburgh, 6 January 1891 (not reported), the town council in such a vacancy, and on the advice of counsel, filled up the vacancy themselves. Acts done by any holder of office are valid, though he may be afterwards declared not elected (s. 44).

*Civil Action for Penalties.*—An elected candidate may not, until he has made the return and declaration respecting election expenses (s. 25), or until the date of the allowance of an authorised excuse, sit or vote in respect of the corporate office to which he has been elected. If he does so, he shall forfeit £50 for every day on which he sits and votes to any person who sues for it (s. 25 (4)).

[Blair's *Election Manual*; Marwick's *Municipal Elections*; Graham's *Corrupt Practices*; Rogers on *Elections*; Parker on *Elections*.]

See ELECTION PETITION (PARLIAMENTARY); PARLIAMENTARY ELECTION; CORRUPT AND ILLEGAL PRACTICES; COUNTY COUNCIL, MUNICIPAL, SCHOOL BOARD, PARISH COUNCIL ELECTIONS.

**Electric Lighting.**—The first Act dealing with this subject was passed in 1882. It was an Act to facilitate and regulate the supply of electricity for lighting and other purposes in Great Britain and Ireland (45 & 46 Vict. c. 56). The Board of Trade was empowered to grant licences to a local authority, or to a company or person, to supply electricity within a certain area, for public or private purposes. These licences required the consent of every local authority having jurisdiction within the area. They were granted for a period not exceeding seven years, but might be renewed. They might be granted conditionally, and an application for such a licence required certain advertisement. The Board of Trade was also empowered to grant provisional orders, authorising the supply of electricity, without the consent of the local authority, to make rules as to applications for licences, to insert regulations in licences as to limitation of price to be charged, security from fire, etc. Power was granted to local authorities, subject to certain consents, to borrow for the purposes of the Act, and there were numerous other provisions as to laying the lines, compensation for damage, arbitration, protection of post office telegraphs, reports by Board of Trade, etc. No electric line could be placed above ground, or across or along any street, without consent of local authority: and even if such consent had been obtained, the line so placed might be removed if it were dangerous to public safety.

The next Act on the subject was the Electric Lighting Act, 1888, 51 & 52 Vict. c. 12, which amended the Act of 1882, and provided that in most cases the consent of the local authority should be required before a provisional order for the supply of electricity within any area could be granted. Amended provisions were made for the purchase of an electric lighting undertaking by a local authority, and certain restrictions were imposed as to placing of electric lines, etc.

These Acts were amended by the Electric Lighting (Scotland) Act, 1890, 53 & 54 Vict. c. 13. Where the district of any local authority was also within the jurisdiction of any gas commissioners, the local authority might appoint the gas commissioners to be the local authority for such district for the purposes of the Electric Lighting Acts. This could only be done with the consent of the gas commissioners. The schedule of the Act provided that the consent of the Secretary for Scotland is required to allow any local authority to borrow for the purposes of these Acts.

**Emancipatio** was the voluntary act by which a *paterfamilias* brought to an end his *potestas* over a person in his power. The process of *emancipatio* in the classical law is fully described by Gaius (i. 132). The father sold his son three times by *mancipatio* to a third person, and, after each sale, the son was manumitted. The effect of the third manumission was to free the son from the *potestas*. It was usual for the fictitious purchaser to remanumitate the son to the father after the third *mancipatio*, in order that the latter might himself perform the act of manumission which effected the *emancipatio*, and so become the son's *parens manumissor*. For

the emancipation of a daughter or grandchild only one *mancipatio* and *manumissio* was necessary. In the later empire new and simpler forms of emancipation were introduced, viz., emancipation by imperial rescript, and emancipation by entry in the official *actu* of the Court (*Cod.* 8. 49, 5, 6; *Inst.* i. 12. 6).

The legal effect of emancipation was, that the person emancipated became *sui*, instead of *alieni, juris*, so that henceforth he was able to sue or be sued in his own name, to make a will, to own property. By being emancipated, a person underwent *capitis diminutio minima*, whereby the agnatic relation which previously subsisted between him and the members of his family was severed (*Dig.* i. 7: *Cod.* 8. 49; Gaius, i. 132 *et seq.*).

**Embargo** (from Spanish *embargo*, seizure, arrest; comp. bar, barricade, embarrass (Skeat, *Etym. Diet.*); rarely spelled in Latinised form, Imbargo) is a seizure, detention, or sequestration of ships or merchandise in the ports of the kingdom, by an act of the State, for certain political purposes. Embargoes are belligerent or civil, according to the purpose for which they are imposed.

*Belligerent* or warlike embargo is a sequestration of property belonging to the Government, or the individual members, of the State which is the alleged wrong-doer. It may or may not be accompanied by a seizure of the persons to whom the goods belong. In maritime embargoes the persons and goods are usually seized (Phillimore, *Int. Law*, iii. 44). It is sometimes issued to prevent foreign ships from entering our ports (Park, *Insurance*, i. 168).

It is a mode of redressing wrongs by foreigners midway between REPRISALS (*q.r.*) and war. An embargo may be imposed in anticipation of war, and treated as merely civil if the dispute is amicably settled; as belligerent, if war supervenes (*The Bodes Lust*, 5 Ch.; Rob. at p. 246). In the Russian war of 1854 the Orders in Council laying embargoes on Russian vessels in British and Colonial ports are dated the day following the declaration of war (Hazlitt and Roche, *Mar. Warfare*, pp. 401, 427, 428, where the orders are given *in extenso*). Other examples may be found in the case of the Two Sicilies in 1839 (Hall, *Int. Law*, 4th ed., 384), and of *Don Pacifico* (Pitt Cobbett, *L. C.*, 2nd ed., 148; Boyd's *Wheaton*, 2nd ed., 403; Halleck, *Int. Law*, i. 481).

*Civil* embargoes are founded upon a particular and urgent necessity of State, on the principle *salus populi suprema lex*. In 1766 an embargo was laid on the exportation of wheat and wheat-flour from the United Kingdom. Though this step was believed to have saved the people from famine at the time, it was declared illegal, and a special Act of indemnity was passed,—17 Geo. III. c. 7,—the last clause of which expressly applied the Act to Scotland (Phillimore, *Int. Law*, iii. 46; Hazlitt and Roche, *Maritime Warfare*, 83; Stephen, *Com.*, 12th ed., ii. 499; Hearn, *Government of England*, 41; Dicey, *Law of the Constitution*, 4th ed., 51; Anson, *Law, etc., of Const.*, 2nd ed., 295). Examples of parliamentary embargoes in Scotland in 1689 will be found in Thomson, *Acts*, ix. 45*b*, 52*b*, 58*b*. Wharton (*Dig.* s. 320) gives a detailed account of various embargoes proclaimed by the American Government, chiefly in reference to Great Britain.

A temporary embargo does not dissolve the contract of affreightment, whether it be the act of a foreign Government or of the sovereign common to the parties. Hence wages run during the detention, and also time freights, in the absence of special agreement to the contrary. But if the embargo is by way of reprisal against the country to which the ship belongs,



the freighter may, by notice, determine the contract, for otherwise the act of the Government would affect its own subjects, and not the foreigner (McLachlan, 4th ed., 584; Bell, *Com.*, 7th ed., i. 565-567, 619-621; Abbott, 13th ed., 761, 779, 791, etc.).

The expenses of wages and provisions during detention by embargo do not, in England, fall under general average (Abbott, 649; Arnould on *Insurance*, 6th ed., ii. 882).

Abandonment of the voyage, or expenses caused by an embargo, are not losses within the policy of marine insurance; but embargoes fall within the clause "arrests, restraints, and detentions of princes"; and so, if an embargo is laid by a foreign Government on ships or goods of neutrals or of its own subjects, provided in the latter case that it is at peace with Great Britain, and the step is not hostile to this country, the assured may give notice of ABANDONMENT (*q.v.*), and recover in our Courts as for a total loss. Arnould considers that the same rule applies if a British ship be arrested or seized by the British Government from any State necessity, or detained in port by a British-laid embargo (Arnould, ii. 728, 766, 1040).

[Maude and Pollock, i. 223, etc.; Owen, *Declaration of War*, 39, 256, etc.; Twiss, *Law of Nations* (War), 21, 35; Calvo, *Dictionnaire, s.v.*; *Id. Droit intl.* ii. 608, where there is a full reference to authorities. For criticism of doctrine, as being mainly British, see Boeck, *de la Propriété privée ennemie* (Paris, 1882), s. 233; Heffter, *Droit intl.* (Bergson, 3rd ed.), s. 111; Bluntschli, *Völkerrecht*, ss. 509, 669.]

**Embassy.**—See AMBASSADOR.

**Embezzlement.**—If a person has received the property of another, and is under obligation to account for it, he is guilty of embezzlement if he fraudulently appropriates the property. (As to distinction between embezzlement and theft, see BREACH OF TRUST AND EMBEZZLEMENT.) Special Statutes have been passed to deal with fraud and embezzlement in certain trades and manufactures, *e.g.* 22 Geo. II. c. 27; 17 Geo. III. c. 56.

**Emphyteusis** is a perpetual and real right in land belonging to another person. It originated in a system under which religious corporations and *municipia* let out land for an indefinite term of years, subject to the payment of an annual rent (*vectigal*). The land so held was *ager vectigalis*. The occupiers of the land had their possession protected by interdicts (*Dig.* 2. 8. 15. 1), and, subsequently, by a *utilis actio in rem* (*actio vectigalis*, *Dig.* 39. 2. 15. 26), available even against the owner of the land when non-payment of rent was not alleged (*Dig.* 6. 3. 1. 2).

From the third century the practice of letting agricultural land on these terms was largely adopted by private persons, as well as by the emperor and corporations. After Constantine, lands so let were usually termed *predia emphyteuticaria*, and the rent began to be called *pensio* or *canon* more frequently than *vectigal*. At a comparatively early period the position of the *emphyteuta* had become so like that of owners, that the question arose whether the transaction was not a sale rather than a lease (Gaius, iii. 145). This question remained unsettled until the precise nature of the right was finally determined by the Emperor Zeno (*Inst.* iii. 24. 3), to the effect that the transaction was neither a sale nor a lease, but a special



contract by itself. In other words, the legal relation created by *emphyteusis* was *sui generis*, and was governed by rules of its own.

The *emphyteuta* is not owner of the land: his interest is merely a *jus in re aliena*. So long as his right lasts, however, he can practically deal with the land as if he were actual owner, provided he does not permanently depreciate it. The fruits are his, so soon as they are separated from the soil (*Dig.* 22. 1. 25. 1). He is protected by the same remedies as the owner; his right passes to his heirs, and, subject to certain restrictions, can be alienated, hypothecated, or burdened with servitudes. If he proposed to transfer his interest, he must give notice of his intention to the *dominus*, who might, if he chose, exercise a right of pre-emption. Further, upon every alienation by the *emphyteuta* to a stranger, the *dominus* was entitled to exact a fine, which was fixed by Justinian at the fiftieth part of the price. The chief duties of the *emphyteuta* were to pay his annual rent and keep the land in fair condition. If his rent were three years in arrear, he might be evicted. (On the whole subject, see *Dig.* 6. 3. 39. 4; *Cod.* 4. 66.)

*Emphyteusis* occupies an important place in the history of land tenure. As Sir Henry Maine points out, it marks a stage in the current of ideas which led ultimately to feudalism (Maine, *Anc. Law*, p. 299 *et seq.*). The prominent feature in *emphyteusis* is just the practically double ownership which formed the distinctive characteristic of the feudal system. Sir Thomas Craig and other older Scotch writers employ the term *emphyteusis* to denote a grant in feu-farm. The resemblance between *emphyteusis* and a feu-right in Scots law is discussed in *Stair*, ii. 3. 34; *Bankt.* ii. 3. 53; *Ersk. Inst.* ii. 4. 6; *Ross, Lect.* ii. 394. The relation between this tenure and the feudal system is discussed by Maynz, *Droit Romain*, s. 232.

**Employers and Workmen Act, 1875.**—See MASTER AND SERVANT: DESERTION OF SERVICE.

**Employers' Liability Act, 1880.**—This Act was passed to mitigate the rigour of the common-law rule, that a servant had no action against his master for injury caused by the fault of a fellow-servant. At the time the Act was passed, the hardship to a servant involved in the master's defence of fellow-servant seemed greater than subsequently, when *Johnson*, 1891, A. C. 371, and *Wallace*, 1892, 19 R. 915, had been decided. The Act, however, did not sweep away the defence of fellow-servant altogether. It removed it only in certain specified cases; and it did not create any new grounds of liability.

Those who were admitted to the privilege conferred by the Act were railway servants and any persons to whom the Employers and Workmen Act, 1875, applied. Consequently seamen and those not engaged in manual labour, and menial and domestic servants, were not included. The ground of action remained fault or negligence, and the enactment provided that the plea of fellow-servant should not be maintainable where injury arose (1) from a defect in a thing used in the master's business the existence of which was due to the negligence of a person intrusted with the duty of seeing that the thing was in proper condition; (2) from the negligence of a superintendent while in the exercise of such superintendence; (3) from compliance with the negligent order of a servant which the pursuer was bound to obey; (4) from the act or omission of a servant due to some impropriety or defect in the rules of the employer, or in obedience

to particular instructions given by a servant delegated with the authority of the employer in that behalf; (5) from the negligence of any servant having charge or control of any signal, points, locomotive engine or train, upon a railway.

The amount of damages recoverable under the Act were not to exceed three years' wages of a person in the same grade of the same employment in the same district.

An action would not lie under the Act unless notice of the injury was given within six weeks, and the action raised within six months of the accident, or, in case of death, of twelve months from the date of death. There were further provisions regarding the form and service of notice.

The action had to be raised in the Sheriff Court, but could be removed to the Court of Session.

The Act was originally passed for seven years from 1 January 1881, but was continued under the Expiring Laws Continuance Act.

Since, at the time of writing, the amendment of this Act is engaging the attention of the Legislature, detailed treatment of the subject is reserved for the article MASTER AND SERVANT (which see) (Glegg on *Reparation*, pp. 392-426; Sym on *Employers' Liability*; Spens and Younger on *Employers' Liability*; Macdonnell on *Master and Servant*).

**Emulation.**—See *ÆMULATIO VICINI*.

**Engraving.**—See *COPYRIGHT*.

**Engrosser.**—An engrosser or regrater was regarded as an offender against fair trade. The offence of regrating (and also that of *FORESTALLING* (*q.v.*)) was dealt with by the Act 1592, c. 150. This Act sets out with the statement that sundry Acts of Parliament had been made for the punishment of forestallers and regraters, but that it had not yet been declared what was forestalling and regrating. The Act accordingly defines an engrosser or regrater to be one who gets into his possession, in any fair or market, any corn, victual, flesh, fish, or other wares that shall be brought to be sold, and sells the same again, in any fair or market held in the same place, or any other fair or market within four miles thereof; or one who gets into his hand, by buying, contract, or promises, the growing corn on the field. The punishment is, for the first offence, a fine of 40 pounds Scots, and finding surety to abstain for the future: for the second, a fine of 100 merks: for the third, escheat of moveables. In order that a conviction may be facilitated, it is competent, under the Statute, to charge an accused person with being habit and repute a common engrosser or regrater, without any specification of a particular offence.—[Hume. i. 510.]

**Enlistment.**—Impressment for military service was finally abolished in 1640 (16 Chas. I. c. 28), and enlisting for military service in the regular forces is now entirely voluntary. The Army Act, 1881 (44 & 45 Vict. c. 58), ss. 76-101, and amendments provided by the Army Annual Act, provide the existing regulations. "A person may enlist to serve Her Majesty as a soldier of the regular forces for a period of twelve years, or for such less period as may be from time to time fixed by Her Majesty, but not

for any longer period, and the period for which a person enlists is in this Act referred to as the term of his original enlistment" (s. 76). A person may enlist either for the whole term of his original enlistment in army service, or for a portion of his original enlistment, to be fixed from time to time by a Secretary of State and specified in the attestation paper, in army service and for the remainder in the reserve (s. 77). The reserve means the Army Reserve under the Reserve Forces Act, 1882 (45 & 46 Vict. c. 48). A Secretary of State may vary the conditions, with the assent of the soldier, either by allowing him to go into the reserve, or extending his service with the colours, or extending the term of his original service up to twelve years (s. 78). A soldier's service is reckoned from the date of his attestation, but if guilty of desertion or fraudulent enlistment the whole of his prior service is forfeited (s. 79).

Every person offering to enlist receives from the recruiter, *i.e.* a person authorised to enlist, a notice stating the general requirements of attestation, and the general conditions of the contract to be entered into by the recruit, and directing him to appear before a justice of the peace. If he does not appear, or, on appearing, does not assent to be enlisted, no further proceedings are taken. If he appears and assents to be enlisted, the justice being satisfied that he is not under the influence of liquor, he is cautioned not to give false answers, and the questions in the attestation paper are put to him, and his answers recorded. He is then required to sign the attestation and take the oath of allegiance, and is thereupon deemed to be enlisted as a soldier in Her Majesty's forces. Any person who knowingly makes a false answer to any question contained in the attestation paper is liable on summary conviction to be imprisoned, with or without hard labour, for any period not exceeding three months; or, if attested as a soldier, he may be tried by court-martial (s. 99). The justice must sign and date the attestation paper, and deliver it to the recruiter, and the recruit is entitled to get a certified copy of the attestation paper from the officer who finally approves of him for service. The fee for each attestation is one shilling, and shall be paid to the justice's clerk, and the recruiter's gift of a shilling is no longer necessary (s. 80). A recruit can, within three months after the date of his enlistment, buy his discharge as a matter of right, on payment of a sum not exceeding £10, unless he claims such discharge during a period when the reserves are called out, in which case he can still buy his discharge on the same terms when that period has expired (s. 81). Subject to regulations made from time to time by a Secretary of State, a recruit may be enlisted for service in a particular corps, otherwise he is enlisted for general service; and on attestation he is appointed either to the particular corps, or, if enlisted for general service, to some corps of the regular forces, by the competent military authority, defined in sec. 101 to be "the commander-in-chief, the adjutant-general, or any officer prescribed in their behalf" (s. 82). The recruit when appointed may be "posted," in the case of infantry, to a battalion of his territorial or other regiment, or to the permanent staff of any volunteers belonging to the regiment; in the case of artillery, to any brigade or battery; in the case of engineers, to any troop or company; and in the case of other corps, to any company or station, according to their respective subdivisions, but he cannot be transferred, *i.e.* moved out of the corps to which he belongs, without his consent, except under the special conditions laid down in sec. 83, for the purpose of retaining him in a place when the corps removes, or as a punishment. Within three years of the completion of the original term of his enlistment a soldier may, on the recommendation of his commanding officer, and with the approval of the competent military



authority, re-engage for such further period as will make up a total continuous period of twenty-one years (s. 84). He may also re-engage after twenty-one years, with a right to his discharge three months after claiming it; but private soldiers are only allowed to do so in very special cases, with the approval of the adjutant-general, if serving at home, or the general officer commanding, if serving abroad (s. 85). Sec. 86 provides for the re-engagement of non-commissioned officers; and regulations made in pursuance of this section are contained in Queen's Regulations, s. xix. paras. 79-99. Sec. 87 provides for the prolongation of a soldier's service for a period not exceeding twelve months during war when the soldier is on service beyond the seas, or when the reserves are called out. Sec. 88 gives power to Her Majesty in Council, in case of imminent national danger or of great emergency, by proclamation,—the occasion being first communicated to Parliament, if Parliament be then sitting, or if Parliament be not then sitting, declared by the proclamation,—to continue in permanent service soldiers entitled to be transferred to the reserve, or to call out the reserves (Reserve Forces Act, 1882). Sec. 93 gives power to a Secretary of State to make regulations as to persons entitled to enlist, and the enlistment of soldiers. Sec. 94 provides that, for purposes of attestation of recruits, certain persons in the United Kingdom, India and the colonies and beyond the limits of the United Kingdom, India or a colony, any British consul or vice-consul shall have the authority of a justice of the peace. Aliens may not be enlisted except with the consent of Her Majesty, signified through a Secretary of State, and then only in the proportion of one alien to fifty British subjects in any one corps. No alien so enlisted can hold higher rank in Her Majesty's regular forces than that of a warrant-officer or non-commissioned officer: but negroes or persons of colour, though aliens, may, without restriction as to numbers, voluntarily enlist, and while serving in Her Majesty's regular forces are entitled to all the privileges of a natural-born British subject (s. 95). A master is entitled to claim an apprentice under twenty-one who has been attested as a soldier, provided the apprentice was bound for at least four years by a regular indenture, and was under sixteen when so bound: and provided, further, that the master, within one month after the apprentice has left his service, takes, before a justice of the peace, the oath prescribed in the first schedule of the Act, and gets an order from a Court of summary jurisdiction for the delivery of the apprentice. A master who gives up an apprentice's indenture within one month after his attestation, is entitled to receive so much of the bounty (if any) payable on enlistment to the apprentice as has not been paid to him before notice was given that he was an apprentice (s. 96). These provisions also apply to the case of a person who is an indentured labourer in a colony at the time of his attestation; and if he has been imported at the expense of the employer or the colony, he may be claimed though above twenty-one, and though indentured for less than four years, and at an older age than sixteen (s. 97). Any person who without due authority publishes notices or advertises with regard to recruiting, opens a house or place of rendezvous for recruiting, receives any person under such advertisement, or directly or indirectly interferes with the recruiting service, is liable on summary conviction to a fine not exceeding £20 (s. 98). Sec. 100 provides that any objection, on the ground of error or illegality, with regard to the attestation on enlistment or re-engagement of a soldier, must be taken within three months, if the soldier has been in receipt of pay during that period, in order to make good a claim to be discharged on the ground of such error or illegality; and when a person is in pay as a

soldier in any corps of Her Majesty's regular forces, although he may not have been attested or re-engaged, or not duly attested or re-engaged, he is to be deemed for all the purposes of the Act to be a soldier of the regular forces, with the qualification that he may at any time claim his discharge. Offences in relation to enlistment committed by persons subject to military law, such as *fraudulent enlistment*, i.e. when a man belonging to the regular forces, or the militia when embodied, enlists in the regular forces, militia, royal navy, or any of the reserve forces not subject to military law, without having been discharged or otherwise fulfilled the conditions enabling him to enlist, and enlisting after having been discharged with ignominy or disgrace without disclosing the same, are dealt with in secs. 13, 32-34. A Civil Court can also deal with the offence of fraudulent enlistment with the reserve forces, militia, yeomanry, or volunteers.

*Discharge and Transfer to Reserve.*—Sec. 89 gives power to transfer to the reserve a soldier who has been invalided from service beyond the seas, or, when ordered on service beyond the seas, is either medically unfit for such service, or is within two years of the end of the period of his army service. A soldier cannot be discharged except by order of Her Majesty, by sentence of court-martial, or by order of the competent military authority, and is entitled, on discharge, to receive a certificate of discharge, and a certificate of character, showing his conduct, character, and cause of discharge (s. 92). A soldier enlisted in the United Kingdom, if serving beyond the sea, is entitled to be sent to the United Kingdom, free of expense, for his discharge or transfer to the reserve; and a soldier enlisted in the United Kingdom, and discharged or transferred there, is entitled to be sent, free of expense, to the place where he was attested, or to his residence, if his conveyance there cost no more (s. 90). If a soldier is a lunatic, a Secretary of State may, on his discharge, send him, and his wife and child, to the parish to which he appears to be chargeable from his attestation paper and other available information, and the inspector of poor of such parish is bound to receive him: if he is a dangerous lunatic, he may be sent direct to an asylum by order of a Secretary of State, and such order will, in like manner, make him chargeable in the parish to which he appears to belong.

[See *Manual of Military Law* (War Office, 1894): Clode, *Military Forces of the Crown*; Pratt, *Military Law*; Tovey, *Military Law*.]

SEE ARMY; DESERTION; FOREIGN ENLISTMENT; RESERVE FORCES: MILITIA; VOLUNTEERS; YEOMANRY.

**Enmity.**—If a witness, in criminal proceedings, is proved to be at enmity with the accused, his evidence will not be received. It is necessary, however, that the enmity between the witness and the panel be of a serious nature, in order that the testimony of the witness may be excluded. Mere expressions of hostility towards the accused, uttered before the trial, will not bar the witness from giving evidence, although they may affect his credibility. There must have been overt acts of hostility towards the panel, or at least a "preceding and sufficient cause of capital enmity" between them must be proved.

The person who has been injured by the panel, and on account of which injury he is being tried, is, of course, a competent witness. Even although animosities between him and the accused have occurred prior to the act in question, these do not debar the witness from giving evidence, although they may affect his credibility.

A motion to exclude the evidence of a witness on the ground of malice

to the panel is almost never made now, and would be granted only on proof of overt acts of enmity having taken place between the witness and the accused. (See *Ross*, 1841, Shaw, 40; *Kennedy and Others*, 1822, Shaw, 81; *Crabb*, 1827, Shaw, 208; *Glen*, 1827, Syme, 264; *M'Killop*, 1831, Bell, *Notes*, 258; *Innes*, 1833, *ib.*; *Specks*, 1835, *ib.*; *Clark and Greig*, 1842, *ib.*)

Enmity to a panel is a sufficient ground for excluding a juror. In this case, it is enough to bar the juror from taking part in the trial that he has used hostile expressions towards, or with reference to, the accused.—[*Hume*, ii. 357; *Alison*, ii. 480; *Ersk.* iv. 2. 28; *Dickson*, ii. s. 1761; *Macdonald*, 446, 456.] See EVIDENCE; WITNESS; CHALLENGE OF JURORS.

**Entail.**—It will be convenient to treat this subject in the following order:—

- I. THE ORIGIN AND DEVELOPMENT OF ENTAILS.
- II. TITLE TO MAKE AN ENTAIL.
- III. SUBJECTS SUITABLE TO AN ENTAIL.
- IV. THE DESTINATION OF A DEED OF ENTAIL.
- V. THE STATUTE OF 1685, c. 22.
- VI. THE ESSENTIAL CLAUSES OF A DEED OF ENTAIL.
  1. *THE PROHIBITORY CLAUSES*—
    - (1) *General Rule of Construction.*
    - (2) *Prohibition against Alienation.*
    - (3) *Prohibition against contracting Debt.*
    - (4) *Prohibition against Altering the Order of Succession.*
  - 2 & 3. *THE IRRITANT AND RESOLUTIVE CLAUSES.*
- VII. RESERVED POWERS CONTAINED IN THE DEED OF ENTAIL.
- VIII. EXPRESS CONDITIONS CONTAINED IN THE DEED OF ENTAIL.
- IX. COMPLETION OF DEED OF ENTAIL.
- X. PERSONS AFFECTED BY THE FETTERS.
- XI. LIABILITY OF THE ESTATE FOR THE ENTAILER'S DEBTS, AND THEIR EXTINCTION BY THE HEIR IN POSSESSION.
- XII. STATUTORY POWERS OF AN HEIR OF ENTAIL.
  1. *POWER TO DISENTAIL.*
  2. *POWER TO SELL*—
    - (1) *Under the Clan Acts.*
    - (2) *For Redemption of the Land-Tax.*
    - (3) *To Public Bodies under Compulsory Powers.*
    - (4) *In Payment of Debts affecting the Fee of the Estate, including Entailer's Debts.*
    - (5) *General Power to Sell with Consents.*
    - (6) *General Power to Sell without Consents.*
  3. *POWER TO ENCLAMB* (see EXCAMBION).
  4. *POWER TO GRANT FEUS AND LEASES.*
  5. *POWER TO CHARGE IMPROVEMENT EXPENDITURE.*
  6. *POWER TO GRANT FAMILY PROVISIONS.*
- XIII. PROCEDURE IN ENTAILS.
 

For service of heirs of provision and entry, see SERVICE.

For possession by heir of entail on double titles, see DOUBLE TITLE.

For directions to grant an entail contained in a trust deed, see TRUST.

#### I. THE ORIGIN AND DEVELOPMENT OF ENTAILS.

The word entail implies a "cutting off," and in its widest sense signifies any deed by which the ordinary course of succession sanctioned by law is



cut off, and an arbitrary destination substituted for it. "An estate which descends according to the succession appointed by law cannot be made subject to the fetters of an entail; in other words, a conveyance on which such a destination follows is nothing more than a conveyance to a single individual" (per *Ld. Rutherford Clark, Moubray's Trs.*, 1895, 22 R. 808).

Thus the first thing essential to constitute a strict deed of entail is, that the destination in the deed of conveyance should be to a prescribed series of heirs who are not the heirs-at-law of the entailer. Next, it is necessary that the deed should contain certain clauses, called the fetters of the entail, which operate so as to keep the estate intact throughout the whole line of succession prescribed by the entailer, and by which the heirs are chained, as it were, to the land, and the land to the heirs. The doubt whether it was possible at common law to grant such a conveyance, so as effectually to bind the heir in questions with third parties, led to the passing of the Statute of 1685, c. 22, which enacted that it should thenceforth be lawful to tailzie lands, and laid down the conditions under which this might effectually be accomplished. The author of this Statute was Sir George Mackenzie, then Lord Advocate, and more familiarly known as "Bloody" Mackenzie. No deed of conveyance can constitute a strict deed of entail which does not conform with the terms of this Statute, either actually or constructively, in terms of the later Entail Acts. The Statute declared that the deed of conveyance must contain the following clauses: (1) Such prohibitory clauses as the entailer should think fit, (2) irritant clauses, and (3) resolute clauses. The prohibitory clauses had to include three essential prohibitions, called the cardinal prohibitions, namely, clauses prohibiting the altering of the order of succession, the alienation of the estate from the heirs specified in the deed of conveyance, and the contraction of debt affecting the estate. The effect of the irritant and resolute clauses was merely to make the prohibitory clauses operative, the resolute clause containing the penalty which an heir of entail would incur should he contravene any of the prohibitions,—namely, the forfeiture of his right to the estate,—and the irritant clauses declaring that all deeds granted in contravention of the prohibitions should be null and void. A deed of conveyance containing these clauses, and a destination to a prescribed series of heirs, would become a strict deed of entail, binding on all parties by the proper execution of certain formalities set forth in the Statute of 1685: the most important of which was the publication of the deed of entail by registration in the Register of Tailzies. A deed of conveyance containing a clause authorising the registration of the deed in the Register of Tailzies is now, in terms of the later Entail Acts, as noted *infra*, construed as containing the whole cardinal prohibitions, properly fenced by irritant and resolute clauses.

It was always competent at common law to grant a deed of entail which would be binding in questions *inter heredes*, so as to prevent the heir in possession from gratuitously disposing or alienating the estate, or from altering the order of succession, but which did not bind him in onerous transactions with third parties. After the passing of the Statute of 1685, there was a series of decisions as to the effect of deeds of entail in which one or more of the cardinal prohibitions were either omitted or were not properly fenced with irritant and resolute clauses. The gist of these decisions was to the effect that although an heir in possession might not be validly prevented through some defect in the deed of entail from entering into onerous transactions with third parties which would affect the estate, and might even alienate it altogether from the subsequent heirs of entail, yet at the same time he might be debarred from gratuitously affecting the



estate, or altering the order of succession (see *Carrick*, 1844, 3 Bell's App. 342; *Stewart*, 1830, 5 S. 418, 4 W. & S. 196). Such questions are now only of historical interest, for it is provided by the Rutherford Act (1848) that, where any entail is ineffectual as to one of the cardinal prohibitions, either through a defect in the original deed of entail, or in the investiture following thereon, then the entail is held to be defective as to all the prohibitions, and the entail becomes null and void without any action of declarator. The heir in possession of an entailed estate is regarded not as a liferenter, but as a fiar of the estate, and his power of dealing with the estate is absolute except in so far as he is fettered by the conditions of the deed of entail.

It was found, however, that under a strict deed of entail, constituted in terms of the Act of 1685, an heir's powers were so limited as not only to give rise to serious hardships in the case of the heir himself and his family, but also to injuriously affect the beneficial management of the estate. This led to the passing of a series of Entail Statutes which gradually extended the powers of an heir of entail in possession, and relaxed the strictness of the fetters, until the result has now been reached that the heir in possession has nearly the same powers as a fee-simple proprietor, with this limitation, that he has to obtain the authority of the Court before he can exercise his powers, and has to follow the methods laid down in the Entail Statutes in order to obtain that authority, and in some cases to compensate the next heirs entitled to succeed to the estate under the deed of entail before he can carry out his intentions. The steps by which this result have been reached may be traced by briefly noticing the changes introduced by each of the Entail Amendment Acts in their chronological order.

The first of these Acts (with the exception of two short Acts passed in 1746 (20 Geo. II. cc. 50 and 51), to enable entail proprietors to sell land to the Crown for the purpose of erecting buildings in the Highlands) was the Montgomery Act, 1770 (10 Geo. III. c. 51), which relaxed the fetters only with a view to the beneficial management of the estate. To encourage heirs in possession to improve their estates, it enacted that any heir laying out money on such improvements as enclosing, planting, or draining, or erecting farm houses and offices or outbuildings for the same, or building, repairing, or adding to a mansion-house (known as Montgomery Improvements), should be the creditor of the succeeding heirs of entail for three-fourths of the sum so expended, up to four years' free rental of the estate: and it also authorised the granting of leases and tacks for fourteen years and one life, or for thirty-one years and two lives, or for two named lives and the surviving life: building leases for ninety-nine years; and excambions of small portions of the estate.

The Aberdeen Act, 1824 (5 Geo. IV. c. 87), was applied to the disabilities of the heir in possession in providing for his family, and conferred on him the important privilege of burdening the rental of the entailed estate with provisions (known as Aberdeen Provisions) for his widow and children. The widow's provision is to be a liferent not exceeding one-third of the free yearly rental of the estate (or, in the case of a surviving husband, where the heir in possession was a female, not exceeding one-half of the free yearly rental), and the children's provision a sum varying in amount according to the number of children, but in no case to exceed three years' free rental of the estate.

The only new power introduced in the Rosebery Act, 1836 (6 & 7 Will. IV. c. 42), was a power to sell such portions of the estate as might be necessary

to pay off the debts of the entailer which affected the estate, but it extended the powers given under the Montgomery Act, and allowed the heir in possession to grant leases, at a fair rent and notwithstanding any prohibition as to diminution of rental, for twenty-one years, independent of the tenants' lives; to lease minerals for thirty-one years; and to excamb any portion of the estate, exclusive of the mansion-house and policies, which did not exceed in value one-fourth of the whole estate.

Three short Acts were passed in 1838, 1840, and 1841, of small importance; but the Lands Clauses (Scotland) Consolidation Act (8 & 9 Vict. c. 16, ss. 7-9) allowed the heir to sell such portions of the estate as were required by public bodies who had obtained compulsory powers under Act of Parliament.

A great advance was made in the relaxations of the fetters of an entail, and a radical change was made in the position of the heir, by the Rutherford Act, 1848 (11 & 12 Vict. c. 36), which first gave the heir in possession power to disentail. It was considered right in this Act (the effect of which is discussed at length by Ld. Pres. Inglis in *Black*, 1873, 1 R. 144) to distinguish between entails existing at the passing of the Act, and those which might be subsequently granted. This led to the terms "old" and "new" entails, *i.e.* entails dated before or after 1 August 1848. In two sets of circumstances was it made possible for an heir in possession, being of full age, to acquire the estate in fee-simple without any consents, namely, first, where, irrespective of the date of the entail, the heir had been born subsequent to that date and subsequent to the passing of the Act: and secondly, where, under an old entail, he was unmarried, and the only existing heir of entail. It is unnecessary at this stage to enter minutely into the circumstances under which an heir of entail could disentail with the consents of other heirs, or what consents it was necessary for the heir in possession, whether under a new or old entail, to obtain before he could disentail (see *infra*, XII. 1): but *in no case*, except the two mentioned above, was it possible for him to disentail, unless (1) such consents were voluntarily given, (2) he himself was of full age, and (3) the heir-apparent consenting was of the age of twenty-five. Generally speaking, it was made easier for an heir in possession under an old entail to acquire the estate in fee-simple, than for an heir in possession under a new entail to do so. In addition to the power to disentail, the heir in possession might sell, charge, lease, and feu, with the like consents as enabled him to disentail; and an heir under an old entail might also excamb with certain other consents. Where the heir in possession had executed improvements of the nature of Montgomery improvements before the passing of the Act, and had obtained decree for three-fourths of the sum expended thereon, he might charge the estate with a bond of annualrent for the three-fourths of the amount so expended, and where he had executed such improvements after the passing of the Act, with a bond of annualrent for the whole sum, or he might charge the fee and rents of the estate with a bond and disposition in security for two-thirds of the amount of such bonds of annualrent. He might make his children's provisions a burden on the fee of the estate: and in every case where he had power to burden, he might sell any portion of the estate, except the mansion-house, offices, and policies, sufficient to pay off the bond. For the first time in the Entail Acts the creditors of the heir in possession were brought into consideration, and power was given them to affect the entailed estate for their debts in all cases where the heir in possession was entitled to disentail without consents, and to object to the heir in possession disentailing, or to any other heir consenting to a disentail, where such a proceeding would affect their

debts. Power was also given to the heir under an old entail to grant feus or long leases of any portion of the estate, not exceeding one-eighth part of the value of the entailed estate, on giving notice to the next heir. Two important novelties were introduced in this Act as to the construction of deeds of entail: one to the effect that, where the deed contains a warrant to record the entail, this implies the inclusion in the deed of valid, irritant, and resolute clauses: the other, that an entail, defective as to one of the cardinal prohibitions, is defective as to all of them, which abolishes the distinction previously existing between entails binding on third parties and those only binding *inter hæredes*. A further important provision of this Act deals with estates settled in trust or by a series of liferents, and enacts that, on the succession opening to an heir born after the date of the deed, he shall be fee-simple proprietor.

The Entail Amendment Act, 1853 (16 & 17 Vict. c. 94), which mainly deals with procedure under the Entail Acts, extends the power as to feuing and building leases, conferred by the Act of 1848 on heirs under an old entail, to heirs under a new entail. It also contains clauses allowing the heir to grant bonds and dispositions in favour of any persons advancing the amount of younger children's provisions, provided the children discharge their provision, or that the money advanced is consigned in bank for their benefit, and a clause extending the power of sale to pay entailer's debts which actually affect the estate, to such debts as may be made to affect the estate.

A short Act in 1860 was followed by one of greater importance in 1868 (31 & 32 Vict. c. 84), which conferred on the heir the power to feu any part of the estate without any consents, but subject to the approval of the Sheriff as to the amount of feu-duty to be charged; and also authorised him to consent to the heir-apparent's granting provisions for his younger children. Entailer's debts, or other debts which might be lawfully made to affect the fee of the estate, might be charged on the estate by bond and disposition in security: and the provisions of the Rutherford Act respecting heritable property conveyed by a trust deed or a series of liferents were extended to personal or moveable estate.

The Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101), contains one important alteration (s. 14) in the construction of deeds of entail, and enacts that the registration clause in the deed shall be held to imply the cardinal prohibitions as well as the irritant and resolute clauses.

The Act of 1875 (38 & 39 Vict. c. 61), followed by a short Act in 1878, made an important alteration as to the consents without which the heir could not up to that time disentail, sell, burden, etc., the estate. The age at which the next heir might give his consent was reduced from twenty-five to twenty-one years, and, more important still, the consents of all heirs other than the nearest, if refused, might be valued by the Court: and on such value in money being consigned in bank by the heir in possession, or on sufficient security over the estate being given therefor, such consents might be dispensed with. Power was also given to heirs to borrow in anticipation of expenditure on improvements. Two further important clauses provided that issue of a younger child who predeceased the heir might take their father's share of the provisions for younger children, and that, where the succession to the estate opened to an "heir whomsoever" under the destination, he was to be held to be fee-simple proprietor without any declarator.

The Act of 1882 (45 & 46 Vict. c. 63) introduced changes almost as



important as those of the Rutherford Act. By enacting that heirs possessing under new entails might disentail, etc., with the same consents as heirs possessing under old entails, it practically abolished the difference between old and new entails. By allowing the appointment of a curator to the nearest heir, if under age, who might consent for him, and by authorising the Court to dispense with his consent if it were refused, it makes it possible for any heir, *capax* and of full age, to disentail whenever he pleases; while by enacting that a creditor of the heir in possession, in respect of debts incurred after the passing of the Act, may compel a disentail, it has put it out of the power of an heir under such circumstances to prevent a disentail. The magnitude of these alterations in the position of an heir of entail in possession dwarfs two other provisions of this Act, in themselves sufficiently important, namely, that he may sell the whole estate without any consents at the sight of the Court and without any restriction as to the portion sold, being only sufficient to pay entailer's debts, and that he may charge three-quarters of the amount expended on improvements on the estate, instead of merely two-thirds as previously. Provision is also made in this Act for the event of an heir in possession or any other heir of entail disappearing.

An heir of entail can only exercise the majority of these powers on obtaining the authority of the Court, which in some cases includes the Sheriff and Sheriff-Substitute (see *Procedure, infra*). This authority is obtained by means of petition, setting forth the full circumstances of each case; and the prayer is only granted after the Court has satisfied itself, by means of remit to reporters and men of skill, that the heir in possession is entitled to exercise the power craved, that the facts have been correctly stated, that the provisions of the Entail Acts have been complied with, and that all persons entitled to object to the granting of the petition have had intimation thereof.

## II. TITLE TO MAKE AN ENTAIL.

The only title requisite on the part of an entailer is the possession of a proper, real, or personal right to the estate or subject of disposition. He need not be feudally infeft: a personal right will enable him to make a deed effectual to compel his heir to fulfil the intention, or which will be valid on the making-up of the proper titles (*Livingstone*, 1762, 5 Bro. Supp. 885, 2 Ross' L. C. 425; *Renton*, 1843, 2 Bell's App. 214, 2 Ross' L. C. 435; *Earl of Fife*, 1862, 24 D. 936; 1863, 4 Macq. 469); but a gratuitous deed of entail, made by an heir in possession upon his apparency, is not binding upon those entitled to the succession, who, if they choose, may pass him over and serve to the last infeft (*Clydesdale v. Dundonald*, 1726, Mor. 1275). Where a person has bound himself, as in a marriage contract, to settle his estates in a special way, he has no power to create an entail of the estates so as to avoid the obligation (*Munro*, 13 Feb. 1810, F. C.; *Macleod*, 1828, 6 S. 1043); but where he has conveyed his estate for behoof of creditors, he has still a valid right to entail whatever may remain by way of reversion (*McMillan v. Campbell*, 1834, 7 W. & S. 441).

## III. SUBJECTS SUITABLE TO AN ENTAIL.

The Statute of 1685 applies only to subjects capable of being feudalised, hence these only can be the proper subjects of an entail binding both heirs and third parties; but an entail binding *inter hæredes* can be made of heritable rights which cannot be feudalised, such as of leases by assignation (*Maule*, 4 Mar. 1829, F. C.; *Dalhousie*, 1782, Mor. 10963; and see *Chisholm*, 1864, 3 M. pp. 222 and 226). Any such subjects as lands, houses, even a

theatre (*Brown*, 1870, 8 M. 702), teinds, patronages, fishings, reversions (case of *Chisholm*, *supra*), are the proper subjects of an entail. Adjudications completed by infeftment, even before the expiry of the legal, may be strictly entailed (*Dalyell*, 17 Jan. 1810, F. C.), as also may a *pro indiviso* interest in an heritable estate (*Stirling*, 1827, 6 S. 272); and on the division of the estate among the *pro indiviso* proprietors, the entail applies to the portion allocated to the heir of entail (*Howden*, 1869, 7 M. H. L. 111). Moveables are not proper subjects of entail (*Kinnear*, 1877, 4 R. 705; *Baillie*, 1859, 21 D. 838). The expression "entailed money" is used of money destined to be expended on the purchase of property to be entailed, or which accrues from the sale or surrender of entailed lands under statutory powers, and is regarded as *surrogatum* for these (1875, s. 3; 1882, s. 23 (4, 5), s. 28).

#### IV. DESTINATION OF A DEED OF ENTAIL.

The strict principles of construction applied to the fettering clauses (see *Prohibitory Clauses*, VI. 1. (1)) are not applied to the interpretation of the destination. There is here no material difference between entailed and simple destinations. "The question is simply as to the meaning of the entail in the words he has employed" (per Lord Barcapple in *Gordon*, 1866, 4 M. 532). But it is not competent by means of an entail to perpetuate the legal order of succession, and the destination must be to a special line of heirs. Thus an attempt to entail estates on A. and "his lawful heirs for ever" is a destination to A. in fee-simple (*Leny*, 1860, 22 D. 1272), even if heirs-portioners be excluded (*Macgregor*, 1864, 3 M. 148; *Primrose*, 1854, 16 D. 498); and where the destination is to a series of substitutes and ultimately to the "heirs whatsoever" of the entailor, or of the last substitute, then the last heir-substitute in possession becomes fee-simple proprietor (*Earl of March*, 1760, Mor. 15412, 2 Pat. 49; *Colvill*, 1843, 5 D. 861; 1845, 4 Bell, 248), and he may resettle the estates (*Earl of March*, *supra*); but the settlement would be defeated by the subsequent birth of an heir-substitute named in the original deed of entail (*Mackinnon*, 1756, Mor. 14938 and 6566; *Stewart*, 1859, 22 D. 73). Under such circumstances, the heir-substitute now becomes fee-simple proprietor without any judicial procedure (Act 1875, s. 13). A final destination importing to be to the entailor's "heirs in blood" is a good entail destination (*Collow's Trustees*, 1866, 4 M. 465; *Moubray*, 1895, 22 R. 801). The succession must be lineal or without division, and thus failure to exclude heirs-portioners invalidates the entail (*MacDonald*, 1842, 5 D. 372; *Farquhar*, 1838, 1 D. 121); but here the heirs-portioners take the estate in fee-simple, and not the substitute in possession immediately prior to the succession opening to them (*Collow's Trustees*, *supra*, per Lord President, p. 470; *Mure*, 1837, 15 S. 581; 1838, 3 S. & M.L. 237). An intention to exclude heirs-portioners will not be inferred from other parts of the deed (*Farquhar*, *supra*; *Leny*, *supra*). Where the succession was divided equally between the entailor's sisters, the succession vested in them in fee-simple (*Sands*, 1844, 6 D. 365). When in a destination particular heirs are described, those take who answer the description when the succession opens (*Shepherd*, 1836, 15 S. 173, 3 S. & M.L. 255; *Martin*, 1853, 15 D. 950, 2 Macq. 556; *Duke of Roxburghe*, 1810, 5 Pat. 320). Where the destination in the deed of entail of one estate was ultimately to the heirs-substitute in a deed of entail of another estate, and the other estate was disentailed, it was held that the destination in the first deed of entail remained operative (*Inglis*, 1894, 22 R. 266; 1895, 22 R. (H. L.) 51); but where the destination



imported to be to "the heirs of entail in possession" of another entailed estate, the disentail of that estate voided the former destination (*Schank*, 1895, 22 R. 845).

#### V. THE STATUTE 1685, c. 22.

Since no deed of strict entail can be executed unless either in the actual terms of this Statute or constructively so in terms of amending Acts, it may be quoted at length. It first declares "that it shall be lawful to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies with such provisions and conditions as they shall think fit, and to effect the said tailzies with irritant and resolute clauses, whereby it shall not be lawful to the heirs of tailzie to sell, annailzie, or dispone the said lands or any part thereof, or contract debt, or do any other deed whereby the samen may be apprized, adjudged, or evicted from the other substitutes in the tailzie, or the succession frustrate or interrupted; declaring all such deeds to be in themselves null and void, and that the next heir of tailzie may immediately, upon contravention, pursue declarators thereof, and serve himself heir to him who died last infeft in the fee, and did not contravene without necessity any ways to represent the contravener." Then follow the solemnities to be observed in order to render the deed effectual, viz.: "It is always declared that such tailzies shall only be allowed in which the foresaid irritant and resolute clauses are insert in the procuratories of resignation, charters, precepts, and instruments of sasine; and the original tailzie once produced before the Lords of Session judicially, who are hereby ordained to interpose authority thereto; and that a record be made in a particular register book to be kept for that effect, wherein shall be recorded the names of the maker of the tailzie and of the heirs of the tailzie, and the general designations of the lordships and baronies, and the provisions and conditions contained in the tailzie, with the foresaid irritant and resolute clauses subjoined thereto. . . ; and which provisions and irritant clauses shall be repeated in all the subsequent conveyances of the said tailzied estate to any of the heirs of tailzie; and being so insert, His Majesty . . . declares the same to be real and effectual not only against the contraveners and their heirs, but also against their creditors, comprizers, and adjudgers and other singular successors whatsoever, whether by legal or conventional titles; It is always hereby declared, that if the said provisions and irritant clauses shall not be repeated in the rights and conveyances whereby any of the heirs of tailzie shall brook or enjoy the tailzied estate, the said omission shall import a contravention of the irritant and resolute clauses against the person and his heirs who shall omit to insert the same, whereby the said estate shall *ipso facto* fall, accrese, and be devolved to the next heir of tailzie, but shall not militate against creditors and other singular successors who shall happen to have contracted *bonâ fide* with the person who stood infeft in the said estate, without the said irritant and resolute clauses in the body of his right: And it is further declared that nothing in this Act shall prejudice His Majesty as to confiscations or other fines as the punishment of crimes, or His Majesty or any other lawful superior of the casualties of superiority which may arise to them out of the tailzied estate, but these fines and casualties shall import no contravention of the irritant clause."

#### VI. THE ESSENTIAL CLAUSES OF A DEED OF ENTAIL.

These are: (1) the prohibitory clauses aimed against the alienation of the estate, the contraction of debt affecting the estate, and the alteration of

the order of succession by the heir of entail in possession. These three prohibitions are called the "cardinal prohibitions," being essential to effectually fetter the heir in possession, who is the bar of the estate and therefore at liberty to deal with it as he wills, in so far as not restrained by the prohibitions. (2) The irritant clauses declaring that all deeds executed in contravention of the prohibitions shall be null and void, and (3) the resolute clauses declaring that any heir of entail in possession contravening any of the prohibitions shall forfeit his right to the estate, sometimes for himself and sometimes for all those heirs who might take as his descendants. The Statute of 1685 did not attempt to give any technical definition of these clauses, but it did enact that it was not sufficient that they should only appear in the original deed of entail, but that they must be repeated *ad longum* in every subsequent deed and instrument necessary to the conveyance of the estate. The effect of the essential clauses, which is considered *infra*, and their construction, proved a fruitful source of litigation, each deed of entail having to be construed separately. A series of enactments have, however, been passed which avoid any question as to what constitute valid, prohibitory, irritant, and resolute clauses in a deed of strict entail, and dispense with the necessity of their repetition *ad longum* in each conveyance of the estate. The Titles to Lands Consolidation (Scotland) Act, 1868, 31 & 32 Vict. c. 101, s. 14 (consolidating 11 & 12 Vict. c. 36, s. 39; 21 & 22 Vict. c. 76, s. 18; 23 & 24 Vict. c. 143, s. 12), provides that where a deed of entail contains an express clause authorising registration of the deed in the Register of Tailzies, it shall not be necessary to insert clauses of prohibition against alienation, contracting of debt and altering the order of succession, and irritant and resolute clauses, or any of them; and that such clause of registration contained in any deed of entail of lands not held by burghage tenure, dated on or after 1 October 1858, and of lands held burghage tenure, dated 10 October 1860, shall have the same operation and effect as if the prohibitory, irritant, and resolute clauses had been inserted in the deed.

Thus, in a modern deed of entail, a clause authorising registration may take the place of the prohibitory, irritant, and resolute clauses, and all questions in a deed of entail containing such a clause as to the efficacy of the prohibitory, irritant, and resolute clauses will be avoided. The same Act, s. 9 (consolidating 10 & 11 Vict. c. 48, ss. 3, 4, and 5; c. 51, s. 26; 21 & 22 Vict. c. 76, s. 17; 23 & 24 Vict. c. 143, s. 11, 27), provides that it is sufficient in any conveyance of an entailed estate to refer to any prior recorded conveyance of the estate which forms part of the progress of titles of the lands under the deed of entail, and which contains in full the destination of heirs or the prohibitory, irritant, and resolute clauses, or the clause authorising registration of the deed of entail in the Register of Tailzies as contained in the original deed of entail. And such a reference is equivalent, whatever the date of the deed of entail, to a full repetition of the said clauses.

1. *THE PROHIBITORY CLAUSES.*—(1) *General Rule of Construction.*—The Statute of 1685 contains no technical definition of the prohibitions (per *Ld. Corehouse* in *Little Gilmour*, 16 S. 1267), but the rule of construction is in favour of freedom from the fetters, and no limitation will be implied or inferred which is not clearly expressed, nor will it be deduced from any other prohibition (*Overtoun Entail*, 1839, *Macl. & Rob.* 871, 885; *M'Kenzie Fraser*, 1879, 7 R. 134; *Cathcart*, 1863, 1 M. 759). "If an expression in an entail admits of two meanings, both equally technical, grammatical, and intelligible, that construction must be adopted which destroys the entail, rather than

that which supports it" (per *Ld. Campbell* in *Lumsden*, 1843, 2 Bell, 114); but a malignant construction of the prohibition is now to be avoided (per *Ld. Gifford* in *Wallace*, 1880, 7 R. 906). To be complete, the clauses must appear in the deed which enters the record (*Kenny*, 1875, 2 R. 636; *Gammell*, 1849, 12 D. 19; 1852, 1 Macq. 362), and not merely referred to as existing in another deed of entail (*E. of Mansfield*, 1844, 6 D. 1073; *Aboyne Entail*, 1842, 4 D. 843).

(2) *The Prohibition against Alienation*.—Gratuitous alienation of the estate is not excluded by a prohibition to sell (*Russell*, 1852, 15 D. 192; *E. of Eglinton*, 1845, 7 D. 425). A sale of the life-interest of the heir in possession, if duly guarded so as not to affect subsequent heirs, is not an alienation (*Fairlie*, 1860, 22 D. 632); nor is a propulsiion of the whole or part of the estate to the next heir entitled to succeed (*Dupplin*, 1871, 10 M. 89; *MacLeod*, 1827, 6 S. 77); nor is the assignation of a bond, containing a power of sale, to which the heir had become entitled, in favour of third parties (*MacDonald*, 1877, 4 R. 280). The granting of feus is an alienation (*Catheart*, 1756, 1 Pat. App. 618; *D. of Roxburghe*, 1813, 5 Pat. App. 768), as is the granting of a liferent to a widow in excess of her terece (*Rogerson*, 1872, 10 M. 698). A prohibition to alienate also interfered with the granting of leases for a longer period than that necessary for agricultural purposes (*Queensberry Leases*, 1813, 5 Pat. 758; *Bontine*, 1864, 2 M. 918). It does not prevent an heir cutting timber if ripe, provided his so doing does not interfere with the amenity of the mansion-house (*Hamilton*, 1757, M. 15408; *Bontine*, 1827, 5 S. 811; *Huntly's Trs.*, 1880, 8 R. 50). If the heir grant a building lease (under powers), he cannot even prevent his tenant cutting the timber on the plea of its being an alienation (*Elibank v. Renton*, 1833, 11 S. 238).

(3) *The Prohibition to contract Debt*.—This applies not to the personal debts of the heir in possession, but to debts by which the estate might be burdened, adjudged, or in any way affected to the detriment of the subsequent heirs (*McKenzie*, 1823, 2 S. 331; *Denham*, 1737, 5 Bro. Supp. 200; *Munro*, 1828, 3 W. & S. 344). The prohibition must contain words equivalent to a prohibition against contracting debts which may affect the lands (*Seton*, 1854, 16 D. 659; *Martin*, 1844, 6 D. 1320; *Catheart*, 1846, 8 D. 970; *Catheart*, 1863, 1 M. 759; *Arbuthnot*, 1865, 3 M. 835; *Aboyne Entail*, 1842, 4 D. 843; 1843, 3 Bell's App. 254). It does not prevent the heir borrowing on his life-interest (*Bontine*, 1837, 15 S. 711), and even in an onerous entail does not hinder the estate being attached for debts contracted prior to the completion or recording of the entail (*Smollet*, 1807, Mor. App. Tailzie, No. 12; *Munro*, 1831, 5 W. & S. 359; and see *Entailer's Debts*, head XI.). In questions between heirs of entail and creditors, the heirs are treated as creditors, and that party is preferred whose right is first completed by infestment or otherwise (*Shenchan* case, 1784, Mor. 15435; revd. 1822, 1 Sh. App. 320). The prohibition includes burdening the estate for widows or children, but a power so to burden does not invalidate the prohibition (*Catton*, 1872, 10 M. H. L. 12).

(4) *The Prohibition against Altering the Order of Succession*.—This prohibition sometimes appears combined with that against alienation. To be effectual, it must be possible to extract from the combined clause a clear prohibition against altering the order of succession, and not merely a prohibition against defeating the next heir's chance of succeeding. This was held to be effectually done in *Roxburghe Entail*, 1811, 5 Pat. 362; *Campbell*, 1839, Macl. & R. 898; and the reverse in *Elphinstone*, 1850; 12 D. 848; *Overtoun Entail*, 1839, Macl. & R. 871; see *Wallace*, 1880, 7 R. 902.



To add to the destination is equivalent to alteration (*Menzies*, 1785, Mor. 15436).

2 and 3. *THE IRRITANT AND RESOLUTIVE CLAUSES*.—These are the clauses which, in terms of the Statute 1685, are necessary to make the entail effectual against third parties—the first irritating or annulling all deeds granted in contravention of the prohibitions, and the latter resolving or forfeiting the right of the heir who contravenes. As in the case of the prohibitive clauses, a clause of registration is now equivalent to the insertion of the irritant and resolute clauses (*supra*). The deed to be annulled must be one affecting the estate (*Gibson*, 1869, 7 M. 791); and if either the institute or any one of the heirs is not comprehended in these clauses, he is not affected by them (*Elibank*, 1833, 12 S. 74; 1835, 1 S. & M.L. 1; *Morehead*, 1833, 11 S. 863; rev. 1835, 1 S. & M.L. 29; *Wauchope*, 1884, 11 R. 424). The same strict rules of construction are applied to these clauses as to the prohibitions, and hence erasures or omissions are fatal, and cannot be supplied by implication (*Sharpe*, 1832, 10 S. 747; revd. 1835, 1 S. & M.L. 594). To effectually fetter the heir in possession, it is essential that these clauses should refer to all the prohibitions: but to make the entail valid against third parties, it is only necessary that they should cover the three cardinal prohibitions (*Anstruther*, 1840, 3 D. 142). This may be done by a general reference in the irritant and resolute clauses to the prohibitions, or by enumeration of the individual prohibitions in detail. As the irritant and resolute clauses in the deed of entail usually follow directly after the prohibitory clauses, and are sometimes coupled to them by some such words as “all which,” it has been a frequent matter of construction whether the reference contained in the irritant and resolute clauses clearly refers to *all* the prohibitions, or merely to the prohibitions immediately preceding the irritant clause. In some entails where such coupling words have been used, the reference in the fettering clauses have been held to include all the prohibitions (*Hay*, 1842, 5 D. 347; *Malcolm*, 1873, 11 M. 722; and *Wallace*, 1880, 7 R. 902), and in others only to include some of the prohibitions (*Lang*, 1838, 1 D. 98; revd. 1839, MacL. & R. 871; *Sinclair*, 1841, 3 D. 636; *Baillie*, 1850, 12 D. 1220). Where the irritant and resolute clauses stand alone, and words of reference are used, these words must, on a strict construction, be capable of including all the prohibitions. Words which, standing by themselves, have in some entails been held to do so (*Lumsden*, 1840, 3 D. 136; 1843, 2 Bell, 104; *Lawrie*, 1854, 17 D. 181; *Gilmour*, 1853, 15 D. 587; *Howden*, 1869, 7 M. H. L. 111), have in other entails been held, from the context, to merely refer to individual prohibitions (*Lord Wharndeliffe*, 1849, 12 D. 1; 1850, 7 Bell, 132; *Hay*, 1851, 13 D. 945; *Udney*, 1858, 20 D. 796; *Lang*, 1838, 1 D. 98; 1839, MacL. & R. 871).

Where the clauses are formed on the principle of enumeration, they usually contain general words, in addition to special words, of enumeration of the prohibitions. If the enumeration of the prohibitions is complete, then the general words are superfluous, and the clause is good (*Repton*, 1843, 5 D. 1419; *Ogilvy*, 1874, 1 R. 450; *Speirs*, 1878, 5 R. 923). If the enumeration is incomplete and the general words are *words of reference* capable of including all the prohibitions, still the clause is good (*Earl of Kintore*, 1861; 23 D. 1118; 1863, 4 Macq. 520; *Wauchope*, 1884, 11 R. 424; and see *Rennie*, 1838, 3 S. & M.L. 142). But if the enumeration is not complete, and the general words are not words of reference, then the clause fails, on the principle of defective enumeration; and the general words, if they precede the words of enumeration of the prohibitions, are confined to the prohibitions enumerated: and if they follow, the words of the enumeration

are confined to the prohibitions *ejusdem generis* (per Ld. Westbury in *Earl of Kintore, supra*). Cases in which the enumeration has been held not to embrace all the cardinal prohibitions are: *Thomson*, 1839, 1 D. 592; *Bruce*, 4 Pat. 231; *Baillie*, 1850, 12 D. 1220; *Lord Duffus' Tr.*, 1842, 4 D. 523, 6 D. 1320; *Scott*, 1855, 18 D. 168; *Rollo*, 1864, 3 M. 78; *Hamilton*, 1870, 8 M. H. L. 48.

## VII. RESERVED POWERS CONTAINED IN THE DEED OF ENTAIL.

Apart from the *Statutory Powers* (see XII.) which an heir of entail now enjoys under the later Entail Acts, there are certain relaxations of the cardinal prohibitions which can competently be introduced into a deed of entail, and which are termed the reserved powers. If the power were absolutely contradictory of one of the cardinal prohibitions, the entail would be bad: but even where it is apparently wide enough to render the prohibition inoperative, the rule of construction to be applied to the reserved power is that it is subservient to, and not intended to defeat, the prohibition (per L. J. C. Hope in *Baird*, 1844, 6 D. 650); and the power can only be exercised to such a limited extent as is consistent with the existence of the entail over the greater body of the estate (Ld. Moncreiff in *Baird, supra*, p. 655). With reference to all such reserved powers, the rule is clear that, to the extent to which the estate may be alienated or burdened, it is unentailed and may be attached by creditors. Such reserved powers are: (1) power to sell to pay the entailor's debts (*Kilburney*, 1669, Mor. 15347); (2) power to sell or to exchang the estate, and to reinvest in land to be entailed on the same heirs (*Baird*, 1844, 6 D. 643; 1847, 6 Bell, 7); (3) power to grant feus—which, however, must not be unduly exercised, but with a view to the rational and fit management of the estate (*Roxburghe Feus*, 1808, Mor. App. Tailzie, 13 and 18; 1812, 5 Pat. 609, 768; *Cathcart*, 1755, Mor. 15399, 1 Pat. 618); (4) power to grant provisions to the surviving spouse and to the younger children. The provision must be strictly limited to the amount allowed (*Makgill*, 1798, Mor. 15451), and it usually excludes terce and courtesy (*Gibson*, 1795, Mor. 15869). If the provision be in the form of a bond of annuity restricted by the rental, then the amount of the rental is struck as at the entailor's death (*Douglas*, 1822, 1 S. 382; and see also XII. 6., for the interpretation of "free yearly rental" in exercising the statutory power to grant provisions). "Younger children" are the issue surviving the appointer (*Calton*, 1870, 8 M. 1049; 1872, 10 M. H. L. 12) other than the heir succeeding to the estate (*Dickson, infra*); but if none of the appointer's issue are called in the destination of the entail, there can be no "younger children" in whose favour he can make an appointment (*Dickson*, 1851, 13 D. 1291; 1852, 14 D. 432; 1854, 1 Macq. 729). A provision in the marriage contract of a child, who at the date of the marriage contract is not entitled to succeed, is indefeasible even if the child predecease his father (*Oswald*, 1821, 1 S. 215; approved in *Chancellor's Trs.*, 1896, 23 R. 435). A power to provide for the issue of the "eldest son" has been construed to mean the issue of the next heir entitled to succeed (*Erskine*, 1850, 12 D. 649). Where a child predeceases his parent, the power may now be exercised in favour of the predeceasing child's issue (Act 1875, s. 10); but the heir in possession cannot pass over his younger child in favour of its issue (*Strathallan*, 1840, 2 D. 840, 5 Bell, 396), though the provision may be conveyed to trustees and the younger child limited to a liferent (same case). A provision valid in part stands if separable from the rest (same case). In exercising the power, the heir may attach conditions to the bond of provision granted by him (*Howden*, 1834, 12 S. 734, 1 S. & M.L. 739; *Campbell*, 1860, 23 D. 159). Provisions unpaid by any heir are



exigible from the succeeding heir, and the entailed estate is liable both for capital and interest (*Duke of Richmond*, 1837, 16 S. 172; and see entailor's debts and their extinction, *infra*). It is not a fair exercise of a power to grant provisions contingent on the event of the granter losing his right to the estate in terms of a clause of devolution (*Cassilis*, Elch. "Provisions to Heirs," No. 6, 1745, 1 Pat. 381).

#### VIII. EXPRESS CONDITIONS CONTAINED IN A DEED OF ENTAIL.

In addition to the three cardinal prohibitions, an entailor may insert any conditions he pleases in the deed of entail; and if these are properly fenced, they will be enforced in the same way as the cardinal prohibitions. Such are: (1) Conditions to use the name and arms of the entailor. If an entailor's coat of arms does not exist, one must be got (*Moir v. Graham*, 1794, Mor. 15537); and a coat granted by the Lyon King-at-Arms cannot be challenged in a declarator of contravention (*Hunter v. Weston*, 1882, 9 R. 492). A name, if assumed, need not be the last in order (same case; see also *Munro*, 1828, 3 W. & S. 344). (2) A condition that the heirs must comply with the regulations of the Statute of 1685, which is superfluous, as the statutory regulations can be enforced by any heir. (3) A condition to pay the entailor's debts, which is generally accompanied by a power to burden for that purpose (see *Reserved Powers*, *supra*; *Statutory Powers and Entailor's Debts*, *infra*); and (4) a clause of devolution, which is commonly to the effect that the heir in possession, on succeeding to some other estate, or to a title, is to surrender his right to the entailed estate. The devolution is held to be a condition of the original grant, and on the contingency occurring, the right of the next heir to the entailed estate takes immediate effect, without its being constituted by declarator, and may be enforced by an action of adjudication, the decree in which will give the next heir right to the rents from the date of the occurrence of the contingency (*Harwarden*, 1866, 4 M. 353; and see also *Stewart*, 1859, 22 D. 72). The terms of the clause will be strictly construed, and "succession" to another estate does not include acquisition of that estate under a parliamentary contract (*Hastings*, 1844, 7 D. 1; 1847, 6 Bell, 30). Where the succession to an entailed estate opens to an heir of entail after the contingency contemplated in the clause of devolution has already affected him, he will be effectually excluded from the succession to the entailed estate (*Gilmour*, Mor. 15404; 1756, 1 Pat. 610; *Fleming*, 1804, Mor. 15559; *Henderson*, Mor. 4215; 1791, 3 Pat. 686). The heir of entail may elect between the two estates where the devolution is contingent on succession (*Stirling*, 1834, 12 S. 296); but he may not deprive his descendants of the succession, in the event of their being entitled to come in under the same or a subsequent destination (*M. of Bute*, 1803, 4 Pat. 450; *Fullarton*, 1825, 1 W. & S. 410). For the construction of special clauses of devolution, see *Leslie*, 1742, 1 Pat. 324; *Hay*, Mor. 15425; 1773, 2 Pat. 322; *Campbell*, 1868, 6 Mor. 1035; *Munro*, 1868, 7 M. 250; *Nicolson*, 1878, 5 R. 872). An heir in possession whose right may be devolved has all the rights of an heir-substitute until the occurrence of the contingency (*Montgomerie*, 7 D. 425, 9 D. 1167; 1847, 6 Bell, 136); and where succession to a peerage would devolve the estate from the heir in possession and his "heir-apparent," it was held he could disentail with the consent of his eldest son (*Forbes*, 1888, 15 R. 797).

#### IX. COMPLETION OF DEED OF ENTAIL.

The entail, to be effectual against third parties, is completed by the publication of its terms; and this, according to the Act of 1685, was effected

by recording the deed itself, with the authority of the Court, in the Register of Tailzies, and by repeating *ad longum* the prohibitory, irritant, and resolute clauses in all the instruments of the investiture, and in the procuratories of resignation, the precept of sasine of the deed, and all the subsequent deeds of transmission. It is now sufficient, in any deed of conveyance, to refer to these clauses, or to the clause of registration which may now take their place, as set forth in the deed of entail itself. An instrument of sasine, too, is no longer necessary, and it is sufficient to record the deed itself in the Register of Sasines (31 & 32 Vict. c. 101, s. 9). Warrant to record an entail is obtained by petition (*Jurid. Styles*, iii. 477); but this is not the proper stage at which to discuss the validity of the entail (*Gilmour*, 1856, 19 D. 134). The petition may be presented by the maker, his trustees, the institute or any heir-substitute, but not by an heir whomsoever (*Jessop*, 1822, 1 S. 273); and any heir-substitute is entitled to compel the heir of entail to record the deed (*Napier*, 1765, 2 Pat. 108). The deed of tailzie must be produced, and diligence will be granted for its recovery (*Ker*, 1804, Mor. 14984; *Spittal*, 1781, Mor. 15617); where it has been lost, the decree in the proving of its tenor may be recorded (*Pringle*, 20 Dec. 1790, Tait's MS.; see Shand's *Practice*, p. 1019). An inaccuracy in the petition does not cancel the validity of the authority given to record, if the proper deed of entail have been produced (*Norton*, 1852, 14 D. 944, 2 Macq. 205). The proper deed to record is the actual settlement of the estate (*Id. Forbes*, 1858, 20 D. 917; *E. of Fife*, 1862, 4 Macq. 469). The names of the heirs of tailzie must be recorded; but if contained in a separate deed of nomination, this may be done subsequently to recording the deed of tailzie (*Padwick*, 1874, 1 R. 697). Deeds executed under a reserved power must also be recorded (*Inglis*, 1851, 14 D. 54), and the full description of the lands entailed must enter the record (*King*, 1844, 6 D. 821; 1846, 5 Bell, 82). An unrecorded deed of entail has no protection from the Act of 1685; and although it is binding on the heirs themselves, in so far as to protect the estate against their gratuitous deeds, it has no effect against the onerous creditors of the heir in possession (*Willison*, 1724, Mor. 15369). It is equivalent to a non-existent deed of entail in reference to such creditors; and their rights cannot be defeated by any subsequent registration of the entail, or by any proceedings founded on the entail, to whatever lengths these proceedings may have gone (*Ross*, 1836, 14 S. 453; *Rose*, 1828, 6 S. 945; 1831, 5 W. & S. 359). They could even adjudge the estate after the heir who had contracted the debt had forfeited the estate by a contravention (*Ross, supra*). The heir under an unrecorded entail can sell the estate (*Grahame*, 1829, 8 S. 231); and he is not bound to reinvest the price (*Montgomerie*, 1843, 2 Bell, 149).

#### X. PERSONS AFFECTED BY THE FETTERS.

In questions with third parties all the heirs-substitute are bound by the limitations of the entail, but doubts sometimes arise as to whether the limitations are properly made to affect (1) the institute; (2) whom failing before the succession opens, the first of the heirs who takes the estate; and (3) the maker of the entail where he is himself the institute. The institute is the party named in the deed as the first beneficial taker of the fee (*Logan*, 1836, 15 S. 291; 1839, MacL. & R. 790). He may be subjected to the restraints of an entail (*Willison*, 1726, Mor. 15458), although there is no express authority for this in the Act of 1685. He must be expressly comprehended in the prohibitory clauses, and is not included among the "heirs" or "members" of tailzie even by implication

from other parts of the deed (*Edmonstone*, 1771, 2 Pat. 255; *Steel*, 1817, 6 Pat. 322; *Lord Elbank*, 1833, 11 S. 858; *Logan*, *supra*; *Glendonwyn*, 1873, 11 M. H. L. 33). If he is expressly comprehended in the prohibitory clauses, he may be included in a general term in the irritant and resolute clauses (*Lindsay*, 1844, 3 Bell's App. 254; *Carriek Buchanan*, 1838, 16 S. 358; 1844, 3 Bell, 342). If, owing to the failure of the institute named in the deed, the succession opens to the next heir, he is included under the "heirs of tailzie," and the above rules do not apply to him (*Napier*, 1765, 2 Pat. 108). With regard to the maker of entail, it is also essential that the fetters be applied to him, and that the deed be completed by infeftment and registration (*Douglas*, 1762, M. 4358, 4375); but since it is a fundamental rule of law that no one can retain the fee of an estate and at the same time remove it from the reach of his creditors, so the maker of an entail cannot *gratuitously* include himself within the prohibitions so as to prejudice his creditors (*Dickson*, 1786, Mor. 15534, 5 W. & S. 662; affd. 1831, 5 W. & S. 657); but by an onerous and mutual tailzie he may so include himself (*Vans Agnew*, 1784, Mor. 15435; 1822, 1 Sh. App. 320). The results of the authorities as to the making of an entail which shall be binding on the granter are collected in *Ld. McLaren's Wills and Succession* (3rd ed.), vol. i. s. 988, as follows: (1) Where the deed of entail divests the granter of the fee and leaves him only a liferent of the estate, then, as long as the entail remains personal, it can only be binding *in obligatione*, and may be discharged with consent of the institute; but after registration and infeftment (*Gordon*, 1771, Mor. 15579) it is a complete entail, incapable of being defeated by the debts or deeds either of the granter or the institute. (2) Where the granter is not divested, but the entail is onerous, and the restraining clauses are directed against the entailer as institute, the entail while it remains personal is effectual to bar gratuitous alienation; after registration in the Register of Tailzies it is effectual in respect of its onerosity against the personal creditors of the institute whose claims are subsequent in date to the registration of the deed; after registration and infeftment, it is effectual against all creditors whatsoever, except those whose claims "had become real charges upon the estate before infeftment" (*Vans Agnew*, *supra*). (3) Where the granter is not divested and the entail is not onerous, the settlement may be made binding *inter heredes* by compliance with the requisites of the Statute; but the estate continues to be liable for the debts and obligations of the entailer to the time of his death (*Dickson*, *supra*; *E. Lauderdale*, 1730, Mor. 15556).

#### XI. LIABILITY OF ESTATE FOR ENTAILER'S DEBTS, AND THEIR EXTINCTION BY THE HEIR IN POSSESSION.

An entailed estate is generally liable for all the debts of the entailer, unless he himself is the institute in the deed of entail, and is expressly included in the fetters so as to exclude legal diligence for payment of debts contracted by him after the date of the deed of entail (see *Persons affected by the Fetters*, X.). Payment of entailer's debts is also often inserted in the deed of entail as a condition under which the heirs may take the succession. In this latter case they only affect the entailed estate if it is clearly the intention of the entailer that the estate is to be affected by them (see *Campbell*, 1747, Mor. 5213; *Moncreiff*, 1825, 1 W. & S. 672; *Elliot*, 1823, 2 S. 180, 1 W. & S. 678; *Jardine*, 1833, 11 S. 720). Unless the entailer's debts have been made real burdens primarily affecting the estate, the heir of entail is entitled to the benefit of discussion, and may insist on the executory of the



entailer and his unentailed heritage being first exhausted (*Russell*, 1745, Mor. 5211). Bonds of provision granted under a power in the deed of entail are also like entailer's debts (*Howden*, 1834, 12 S. 734; *D. Richmond*, 1837, 16 S. 172). The heir in possession is personally liable in the first place for such debts, but only to the value of the entailed estate (*Sutherland*, 1801, Mor. Tailzie, App. No. 8); but the estate is also liable, and may be adjudged or sold to pay them (*Lauderdale*, 1730, Mor. 15556). The heir in possession may leave the debts as a burden on the estate in the hands of the succeeding heirs (*Campbell*, 29 Nov. 1815, F. C.; *D. Richmond*, *supra*); and it is to prevent this that the condition obliging the first heir in possession to pay is so frequently included in the deed of entail. Arrears of interest affect the estate as well as the principal (*Erskine*, 1829, 7 S. 844; *Sands*, 1835, 13 S. 1040; but see 11 & 12 Viet. c. 36, ss. 17, 18, and 21, for a statutory exception in case of interest on bonds). Where the entailer leaves two estates under different entails, his debts are allocated rateably (*Lawrie*, 1830, 9 S. 147). Where the heir in possession pays off such debts from his own funds, even if he is not bound to do so, they are not necessarily extinguished *confusione* as a claim against the estate (Ersk. iii. 4. 27); but they will be held to be so extinguished where the heir of entail is liable for the debts in some general character, *e.g.* as executor or heir-at-law, unless the debts have been declared to be primarily chargeable on the entailed estate (M'Laren, 3rd ed., s. 997)—with this exception, that it is presumed, in the absence of evidence to the contrary, that an heir of entail paying such debts out of his own funds intended that they should be kept up against the estate (*Caddell*, 1845, 7 D. 1014; *Kerr*, 1758, Mor. 15551; *Crawford*, 11 March 1809, F. C.). Taking an assignation to the debts shows an intention that they are to be kept up against the estate (*M'Donald*, 1877, 4 R. 280; *Welsh*, 1837, 15 S. 537; *Kerr* and *Caddell*, *supra*); but if the heir merely take a discharge, the presumption is that he meant to extinguish the debt (*Wauchope*, 14 Dec. 1815, F. C.; 1825, 1 W. & S. 41). Such a transaction may be vitiated by fraud or breach of statutory requirements (*Cleghorn*, 1840, 3 D. 1, Macl. & R. 1033). If the entailer leave other property to which the heir of entail also succeeds as executor or heir of line, that must be first exhausted before the entailed property can be affected (*Crawford*, 11 March 1809, F. C.; *Forbes*, 17 Nov. 1802, F. C.).

## XII. STATUTORY POWERS OF AN HEIR OF ENTAIL.

1. *POWER TO DISENTAIL*.—This power was first introduced by the Rutherford Act, 1848, and the conditions under which an heir in possession was entitled under that Act to acquire the estate in fee-simple varied according as the entail was dated before or after the 1st of August 1848; hence the distinction between "old" and "new" entails. By the third section of the Act of 1882 the same powers of disentailing were extended to heirs possessing under a new entail which were by the Rutherford Act conferred on heirs possessing under an old entail, and the date of the entail is thus no longer so all-important as it was prior to the passing of the former Act. Reading these two Acts together, an heir in possession may now disentail *without any consents*—

(1) Where he is the only heir of entail in existence for the time, and of full age (1848, s. 3; 1875, s. 5 (3); 1882, s. 3).

(2) Where he is born after the 1st of August 1848, and is of full age (1848, s. 2; 1882, s. 3).

It was further provided in the Rutherford Act that an heir in possession

might, under certain conditions, disentail where he had obtained the consents of certain of the other heirs of entail. In no case were the consents of more than the three heirs next entitled to succeed in their order required, but it was a *sine quâ non* in every case that the nearest heir must be twenty-five years of age and capax (ss. 1, 2, and 3). A curator or guardian might give the necessary consent for any heir other than the nearest who might be unable to consent owing to age or any other legal disability (s. 31). The Act of 1875 reduced the age at which the nearest heir might consent to twenty-one (s. 4), and provided that where any other heir than the nearest declined to give his consent, the Court might, on a motion to that effect by the petitioner, ascertain the value in money of such heir's expectancy, and, on the value being paid into bank, or sufficiently secured over the estate, dispense with the consent (s. 5 (2)). As to the requisites of such security, see *Farguharson*, 1886, 14 R. 231. The Act of 1882 abolished any limitation whatever as to the age or legal capacity of the next heir, and allowed a curator or guardian to consent on his behalf also (s. 12); and further provided that his consent might be dispensed with, if refused, in the same manner as the consents of any other heirs of entail might be dispensed with in terms of the Act of 1875 (s. 13).

Reading these three Acts together, an heir in possession may now disentail *with the following consents*:—

(3) Where he is born *before*, and the heir-apparent is born *on or after*, 1 August 1848, with the consent of the heir-apparent (1848, s. 2; 1882, s. 3).

(4) Where the entail is dated on or after 1 August 1848, and he is born *before*, and the heir-apparent *after*, the date of the entail, with the consent of the heir-apparent (1848, s. 1).

(5) With the consents of the three nearest heirs, or of all the heirs if less than three, entitled to succeed in their order immediately after him, as at the dates of their consents and of presenting the petition (1848, s. 3; 1882, s. 3).

(6) With the consents of the heir-apparent and of the heir who next in succession will become heir-apparent (1848, s. 3; 1882, s. 3), *i.e.* of the two heirs next in succession to the heir in possession, whose right of succession, if they survive, must take effect.

Any creditor of an heir in possession entitled to disentail, who has charged on a decree for payment of debt contracted after 18 August 1882, can apply to the Court to have the estate disentailed (1882, s. 18); but where the heir in possession or the heir-apparent have secured, by obligation undertaken in a marriage contract dated before 18 August 1882, the descent of the estate on the issue of the marriage, they may neither disentail nor give consent to a disentail without the consent of the marriage-contract trustees until the marriage be dissolved, or a child be born who can consent (1882, s. 17; *Douglas*, 1883, 10 R. 952); but there must be a clear obligation securing the descent of the estate on the issue (*Pringle*, 1891, 18 R. 895). The "heir in possession" is the heir in whom the fee rests (*Maule*, 1876, 3 R. 831). The date of an entail is the date of any Act of Parliament, deed of trust, or any writing directing the land should be entailed (1848, s. 28; *Buchanan*, 1883, 10 R. 809), even if the deed direct that the land be bought and entailed at a later date (*Black*, 1873, 1 R. 133; *Fraser*, 1852, 14 D. 916). The deed of disentail only removes the fetters, and does not evacuate the destination (1848, s. 32; *Gray*, 1878, 5 R. 820). The security to be given by an heir in possession desiring to disentail for Aberdeen provisions to children must be for the maximum



amount chargeable (*Glasgow*, 1886, 14 R. 59), while the widow's annuity is to be computed from the rental at the date of the disentail (*ib.*, and see XII. 6.). The value of an heir-substitute's expectancy is taken as at the date of the deed of disentail (*Sprot*, 1882, 19 S. L. R. 738), and is the value of his life-interest calculated on his chance of succession, and the value of the powers he might exercise if he were to succeed (*De Virte*, 1877, 5 R. 328). No interest accrues on the value until it is consigned or secured (*Pringle*, 1892, 19 R. 926); and any facts bearing on the probable length of life of the petitioner are relevant, and the chance of the heir-substitute succeeding, as fee-simple proprietor may be considered (*McDonalds*, 1880, 7 R. (H. L.) 41, and *Pringle*, *supra*). The value of the part disentailed is calculated on the loss to the whole estate, not on the intrinsic value of the part disentailed (*Duke of Sutherland*, 1892, 19 R. 504); and the full amount remaining unpaid of a sum charged as improvement expenditure, in the form of a terminable rent-charge, may be deducted from the value of the estate (*Pringle*, *supra*). The succession duty an heir-substitute would have to pay in the event of succeeding to the estate is not a proper deduction from the value of his expectancy (*Pringle*, *supra*). The security to be given to an heir for the value of his consent must be such as a prudent lender would accept, which failing, the money value must be lodged in bank (*Farquharson*, 1886, 14 R. 231). But no action will lie against a *curator ad litem* for failure to obtain proper security for the value of his ward's consent, unless it be averred that the curator acted corruptly in accepting the security which he took (*Maxwell Heron*, 1893, 21 R. 230). An heir who has completed his title as nearest heir in existence is not debarred from disentailing by the possibility of the birth of a nearer heir (*Bruce*, 1874, 1 R. 740); nor by the condition that he is to forfeit the estate on succeeding to a peerage, to which he is then heir-presumptive (*Forbes*, 1888, 15 R. 797); but where the succession has already opened to another estate, and he has to denude of one, he cannot disentail either estate before making his election (*Home*, 1876, 3 R. 591). Where an heir-substitute is born after a petition for disentail has been presented, whose consent would have been required had he been born before the petition, he can only interfere if the consents required before his birth have not been valued (*Shand*, 1876, 3 R. 544), and not afterwards (*Douglas*, 1885, 12 R. 916). The Court may dispense with consents where it is proposed only to sell a part of the estate (*Duke of Sutherland*, *supra*); and where no consents are required, it is in the discretion of the Court to order intimation on the next heirs (*Davys*, 1870, 9 M. 44). Money in the hands of trustees for the purchase of land to be entailed, or land in their hands which they have been directed to entail, may be treated as if it were already entailed estate (1848, s. 27, 28; 1853, s. 8).

2. *POWER TO SELL*.—The following different powers of sale have been conferred on heirs of entail in possession from time to time:—

(1) *Under the Clan Acts* (20 Geo. II. c. 50 and 51), which were passed with a view of civilising the Highlands after the rising of 1745, the heir in possession might sell any part of the estate to the Crown, for the erection of buildings, settlements, etc. The purchase money had to be expended on other lands to be similarly entailed; and the direction to re-entail created a valid trust, which bound all persons taking any estate or interest in the newly-purchased lands (*Fleming*, 1868, 6 M. II. L. 113).

(2) *For Redemption of the Land-Tax*.—This was in terms of 42 Geo. III. c. 116, ss. 61 *et seq.*; and only a part of the estate might be sold, and the

price had to be paid into the Bank of England. The power is now of small importance, but it has been decided in petitions under it that the terms of the Statute must be rigidly adhered to (*Wilson*, 1828, 3 W. & S. 60); and if they are so adhered to, then fraud on the part of the heir in possession will not affect a stranger purchaser (*Wilson, supra*; *Laurie*, 1814, 2 Dow, 556). An error of judgment by the Court of Session in executing the Act was held not fatal to the sale (*Wemyss*, 1824, 2 Sh. App. 1).

(3) *To Public Bodies under Compulsory Powers*.—This was first authorised by the Lands Clauses (Scotland) Consolidation Act (1845, 8 Vict. c. 19, ss. 7–9, 67 *et seq.*), which enacted that the price of the land taken should be consigned in bank, and might be applied, with the authority of the Court, in the redemption of the land-tax; the discharge of any incumbrance affecting the land in respect of which the money is paid, or affecting other lands entailed on the same heirs; or in purchase of other lands to be entailed on the same heirs; or in removing or replacing buildings affected by the new operations; or in payment to any party absolutely entitled to the money (s. 67). The Rutherford Act (s. 26) allows an heir entitled to acquire the estate in fee-simple, to apply to the Court for leave to uplift consigned money, and to acquire it in fee-simple, and if not entitled to acquire the estate in fee-simple, then to apply the consigned money in payment of money laid out, or to be laid out, on improvements (see *Improvement Expenditure*, XII. 5.). The Act of 1853 allows the price of the part sold to be paid in the form of a feu-duty or annual payment (ss. 14–16). Where trustees conveyed an estate under an entail to the heir nominated in the trust deed, having previously sold a part of the estate to a railway company, the price of which had not yet been consigned, the heir, and not the trustees, was held entitled to uplift the price (*E. Strathmore*, 1856, 18 D. 1212). The money may be applied in repayment of improvements on the part sold (*Hay*, 1879, 6 R. 1104), but not of improvements by another heir unless they have been constituted a debt against the estate (*Shaw-Stewart*, 1863, 1 M. 897; *Lockhart*, 1852, 24 Sc. Jur. 587). The expenses of a petition to uplift consigned money, and all conveyances of the land, are paid by the company acquiring the part sold (Lands Clauses Consolidation, ss. 79–81), but not expenses incurred by the petitioner in making up his title (*Graham v. Cal. Rury.*, 1848, 10 D. 495), nor unnecessary expense incurred by him (*Willoughby D'Eresby*, 1885, 13 R. 70), nor expense incurred in preparing and recording a partial discharge and deed of restriction (*Stirling Stuart*, 1893, 20 R. 932).

(4) *In Payment of Debts affecting the Fee of the Estate, including Entailer's Debts*.—The clauses now regulating this power are Act 1848, s. 25, Act 1853, s. 9, and Act 1868, ss. 9–11, and include among the debts which affect, or may be made to affect, the fee of the estate, debts of the entailer, and thus practically supersede the special power which had previously been given in the Rosebery Act (ss. 7 *et seq.*) “to heirs of entail in possession of an entailed estate liable to be adjudged or evicted for debts or obligations of the maker of the entail,” to sell a portion of the estate in payment of such debts. The power extends to all cases where, under the Rutherford Act, the heir in possession may charge the entailed estate with debt, by granting bonds and dispositions in security over the estate, free from the fettering clauses of the entail, and also to all cases where it is made competent by Act of Parliament so to charge the estate, and to all cases where the fee is validly charged with debt (1848, s. 25); and it is further extended to cases where sums of money might be lawfully chargeable on the fee of the entailed estate (1853, s. 9).

Where a private Act authorised the charging of the estate with debt, but directed that the debt should be exhausted by a series of annual payments, the heir was held entitled to exercise the power (*M'Kenzie*, 1849, 11 D. 1115). The part of the estate to be sold need not be the part affected by the debts (*Kennedy-Erskine*, 1850, 13 D. 41), and no consents are required (*Riddell*, 1853, 15 D. 904). The sale may be either by private bargain or by public roup, under the authority of the Court (1868, ss. 9, 10).

(5) *General Power to Sell with Consents*.—The clauses dealing with this power (1848, s. 4; 1875, s. 6; and 1882, s. 4. 13) follow naturally on the disentailing sections. The same consents necessary to be given in disentail proceedings (XII. 1.) were required before the heir could “sell, alienate, or dispose” any part of the estate.

If the heir in possession is in a position to disentail without consents, then no consents are required for the exercise of this power (*Scott Plummer*, 1885, 12 R. 1349).

(6) *Order of Sale under Act 1882*.—It is made lawful by the Act 1882, s. 19, for “any heir of entail in possession of any entailed estate, or, where an entailed estate consists of land held in trust for the purpose of being entailed, for the person who, if the land had been entailed, would have been the heir in possession, or for the tutors, curators, or administrators of such heir or other person, to apply to the Court for an order of sale of the estate, or part of it.” This enactment gives a power to apply to the Court to have the entailed estate converted into money, such money remaining subject to the fetters of the entail as a *surrogatum* for the estate. The subsequent sections of the Act define the procedure requisite to carry out the sale, and regulate the investment of the entailed money.

The Court (s. 21) is directed to procure a report as to the value of the estate, and as to the rights and charges affecting it, and, “unless it shall appear that any patrimonial interest would be injuriously affected thereby,” to order the estate, or part of it, to be sold in such manner as it thinks proper, provided that, where the application is on behalf of a married woman, minor, pupil, or some other person under disability, the Court must be satisfied that the sale will be for the benefit of the applicant (s. 21). The price of the estate must be consigned in bank, or the equivalent in Consols transferred to the name of the Accountant of Court (s. 23 (1)). The Court provides for the payment of all debts affecting the estate, and may approve of the investment of the money in the name of trustees for the benefit of the heirs of entail in their order, or in the purchase of other lands to be entailed on the same heirs (s. 23).

The effect of this power is “to place the heir of entail in possession in the same position as a fee-simple proprietor in regard to the sale of his estate under the authority of the Court” (per. *Ld. Pres. Inglis* in *Ballantine*, 1883, 10 R. 1061).

3. *POWER TO EXCAMB*.—See EXCAMBION.

4. *POWER TO GRANT FEUS AND LEASES*.—The Montgomery Act (ss. 1–8) first deals with the granting of building and agricultural leases. The latter might be granted for fourteen years and one existing life, or for two lives, provided the tenants fenced one-third of the lands leased in ten years, two-thirds in twenty years, and the whole in thirty years; or might be granted for a period of thirty-one years, provided that in any lease for a period of over nineteen years the tenant was bound to fence one-third of the land in one-third of the period, two-thirds in two-thirds, and the whole before the expiry of the lease (ss. 1 and 2). Such fences had to be kept in repair by the tenant (s. 3; and *Hamilton*, 1846, 9 D. 53). Building leases



might be granted for a period of ninety-nine years (s. 4), but not more than five acres to one person, and the tenant was bound to erect a dwelling-house of £10 value on each half-acre within ten years of the lease, and keep it in order (s. 5). Non-fulfilment of the conditions nullifies the lease (*Miller*, 1868, 6 M. II. L. 101; and see *Carter*, 1890, 18 R. 353). Neither the mansion-house, offices, or policies, nor any part of the estate within three hundred yards of the mansion-house, might be let (s. 6), and no grassum might be taken in consideration thereof (s. 7). But this only applies to a house which is clearly the mansion-house of the estate (*Montgomery*, 1895, 22 R. 465). The tenant is entitled to cut down growing timber if necessary for the reasonable enjoyment of the part leased to him (*Gordon*, 1883, 11 R. 67). The Rosebery Act (ss. 1 and 2) empowers an heir in possession to grant ordinary leases at a fair rent for twenty-one years, and mineral leases for a period of thirty-one years, but no grassum might be taken, and no lease of the mansion-house, home farm, or of the policies might be granted beyond the life of the heir in possession. The Rutherford Act (s. 4) entitles the heir in possession to lease or feu the estate in whole or in part with the like consents which would enable him to dis-entail (*Christie*, 1888, 15 R. 793); while sec. 24 gives an heir under an old entail an absolute power, on giving notice to the heir of entail next entitled to succeed, to feu or grant long leases, with the authority of the Court, of not more than one-eighth part in value of the whole estate, for the highest feu-duty or rent that can be got. A long lease here includes leases for a period exceeding in their duration acts of ordinary administration (*Farquharson*, 1870, 9 M. 66). The Act of 1853 (s. 6) provides that continuing petitions may be presented for authority to feu and grant long leases of not more than one-eighth in value of the whole estate, and that the Court shall fix the minimum feu or tack duty at which the lands may be feued or let, which rate will continue to be acted on, unless the heir in possession move the Court to alter it (*E. Kinnoull*, 1862, 24 D. 379); and sec. 13 extends to an heir in possession under a new entail, which does not expressly exclude feuing or building leases, the same powers of granting feus and leases for more than twenty-one years as are conferred by the Rutherford and Montgomery Acts on heirs in possession under old entails. By the Act 1868, ss. 3-5, power is given to grant building leases for ninety-nine years, or feus, of any portion of the estate on application to the Sheriff, who thereupon gives notice to the next heir and inquires into the circumstances; but no grassum is allowed to be taken by the heir, and any feu or lease granted will be void unless buildings of at least twice the value of the feu or rent are erected within five years, and thereafter kept in order. It is not sufficient that the buildings have been erected before the feu is granted (*Stewart*, 1882, 9 R. 458). By the Act 1882, s. 4, power is given to heirs in possession under a new entail to feu and grant long leases, subject to the like conditions and with the same consents as had previously been given to heirs holding under old entails; sec. 5 authorises all such applications being made to the Sheriff; and sec. 6, the granting of feus or leases of a portion of the estate, not exceeding two acres, for any purpose of public utility, at an adequate feu-duty or rent. The same Act (ss. 8 and 9) authorises the heir in possession to grant a new lease two years before the expiry of the existing lease, and at a reduction of rental.

5. *POWER TO CHARGE IMPROVEMENT EXPENDITURE.* — This was first introduced by the Montgomery Act, it being considered, in the words of that Act, that "it may be highly beneficial to the public if



proprietors of entailed estates were encouraged to lay out money in enclosing, planting, or draining, or in erecting farm-houses and offices or out-buildings" (s. 9). This list of improvements, the cost of which may be charged against the estate, are known as Montgomery Improvements, and the mode of constituting them is provided for in that Act (ss. 9-31). The list of improvements that may be charged has now been largely extended, and the method of constituting the debt simplified, by later Acts which have practically superseded, though they have not repealed, the Montgomery Act. An heir of entail who adopts the procedure of the later Acts is held to have abandoned his position under the Montgomery Act (*Breadalbane's Trs.*, 1868, 6 M. H. L. 43). The Rutherford Act (s. 13) deals with improvements executed by an heir of entail prior to 1st August 1848, while sec. 14 provides that where an heir in possession has executed improvements (*i.e.* Montgomery Improvements) subsequent to the passing of the Act, and has obtained decree for three-fourths of the amount expended thereon, he may execute a bond of annualrent over the entailed estate during the period of twenty-five years from and after the date of the decree, at an annual rate not exceeding £7, 2s. per £100 of the whole of the sums expended. This section, which only applied to old entails, has been made applicable to all entails (1882, s. 4). Where an heir has executed Montgomery Improvements and has not obtained decree therefor, he may petition the Court for authority to grant bonds of annualrent as though decree had been obtained (s. 16). The power under this section has also been extended to new entails, and to all trusts under which land is held for the purpose of being entailed (1868, s. 18). The heir in possession is bound to pay and keep down the annualrents yearly, but no creditor in a bond of annualrent can affect the rents or profits of the estate for arrears of payment beyond two years' annualrent; and unless the estate can be disentailed without consents, no bond of annualrent can be made the ground of adjudication (1848, ss. 17, 22). The heir in possession may charge the fee and rents of the estate, other than the mansion-house, offices, and policies thereof, with a bond and disposition in favour of any person who may advance the money for two-third parts of the sum on which the amount of such bond of annualrent is calculated (1848, s. 18); but the two-thirds limit is now extended to three-fourths (1882, s. 6 (1)); and where one-fourth of the rent-charge has been defrayed by the heir, he may substitute a bond and disposition for the remainder, but without the necessity of obtaining any consents, and irrespective of the date at which the improvements were charged (1882, s. 6 (4)). The 25th and 26th sections of the Rutherford Act first introduce the expression "permanent improvements" as one of the objects to which an heir in possession may apply money obtained by the sale of a portion of the estate, or in respect of damage done to the estate under an Act of Parliament, or money settled in trust for the purchase of land to be entailed. These sections confer no power to charge the estate for money expended on permanent improvements, and the expression has been held to apply to many things which are not included among Montgomery Improvements, such as trenching (*Skene*, 1857, 19 D. 964), and even the renunciation of a long building lease (*Huntly*, 1868, 6 M. 553). But the definition clause of the Act 1875 (s. 3) contains a long list of improvements which, on the one hand, are not included in the Montgomery Act, and, on the other, are not all of the nature of permanent improvements; and by sec. 7 the heir in possession is authorised to borrow money to defray the cost of such improvements as may have been executed within twenty years

of the date of the application, or which are merely in contemplation, provided the Court (which now includes Sheriffs and Sheriff-Substitutes (1882, s. 5)) is satisfied that the improvements are of a substantial nature and beneficial to the estate (*Fogo*, 1877, 5 R. 319). In terms of sec. 8 of the 1875 Act, the estate may be charged with a bond of annualrent for twenty-five years, at a rate not exceeding £7, 2s. per £100 authorised to be borrowed, or with a bond and disposition in security for three-fourths (1882, s. 6 (1)) of the sum on which the amount of such bond of annualrent would be calculated. The expenses of the application to charge may be included in the bond, but only to the extent of three-fourths (*Leith*, 1888, 15 R. 944). Provision is made in sec. 9 of the 1875 Act, by which the heir in possession, with the consent of the nearest heir at the time and of the creditor in a bond of annualrent affecting the estate, and granted in respect of improvements charged against the estate prior to the date of the Act, may substitute a bond and disposition in security for the portion then remaining unpaid (but exclusive of the expenses of the application—*Stewart*, 1886, 13 R. 568); while by 1882, s. 6 (4), the consent of the nearest heir is dispensed with where one-fourth of the capital sum borrowed on rent-charge has already been paid off, and the application may be made irrespective of the date at which the improvements were charged. By the 1875 Act (sec. 11), where an heir in possession has executed improvements, but has not charged them before his death, he may nevertheless expressly bequeath them to any person, who is thereupon entitled to petition the Court to ordain the next heir in possession to grant a bond over the estate in his favour. But a general disposition of the testator's estate does not imply an express bequest of such improvement expenditure (*Maxwell*, 1877, 4 R. 1112), and the right conveyed is *suâ naturâ* heritable (*E. of Kintore*, 1885, 12 R. 1213). All the above powers, which were, by the 1875 Act, confined to heirs possessing under old entails, have been extended to heirs possessing under new entails (1878, s. 3; 1882, ss. 4, 6 (1)). The short Act passed in 1878 provides that any obligation undertaken by an heir in possession, in a lease or agreement with a tenant, with reference to improvements to be executed by the tenant during his tenancy, or in a contract with any person in respect to improvements to be executed on the estate, shall, after the death of the said heir in possession, devolve and be binding on the next heirs of entail, who are bound to relieve his executors (ss. 1 and 2; and *E. of Breadalbane*, 1877, 4 R. 667). The Act of 1882 contains two other sections (ss. 7 and 23) relating to the method in which the amount chargeable for improvements may be ascertained in proceedings for sale or for disentail. See head XII. 2. (3) for decisions as to the application of the price of a part of the estate which has been sold, in payment of improvement expenditure.

In addition to the powers of charging under the Entail Acts, an heir may, in terms of the Improvement of Land Act, 1864 (27 & 28 Vict. c. 114), amended by 30 & 31 Vict. c. 101, s. 115; 31 & 32 Vict. c. 89, s. 6; 40 & 41 Vict. c. 31, s. 5; and 45 & 46 Vict. c. 38, ss. 30, 64, charge the estate with money subscribed for the construction of canals or railways, which may permanently increase the value of the estate; and in terms of the Agricultural Holdings Act (1883, ss. 24, 33), may charge money expended in carrying out the objects of that Act. See also, with reference to *quoad sacra* parish churches, 7 & 8 Vict. c. 44; and to glebes, 29 & 30 Vict. c. 71, s. 17.

6. **POWER TO GRANT FAMILY PROVISIONS.**—The Aberdeen Act, which proceeds on the narrative that it had become expedient to confer on heirs of entail the power to grant adequate provisions to their wives or husbands

and children, deals entirely with this subject. The Act is now regarded as incorporated in every deed of entail (*Callendar*, 1869, 7 M. 777; Act 1868, s. 8). It enacts that a liferent annuity not exceeding one-third part of the free yearly rents of the estate may be settled on the widow of an heir in possession (s. 1), and the same provision may also now be made for the widow of the heir-apparent (1868, s. 6); that a liferent not exceeding one-half of the free yearly rental, or one-third if there be already a similar liferent, may be settled on the husband of an heir in possession (s. 2); and that a bond of provision for the children of an heir in possession, of an amount not exceeding one year's clear rental of the estate in the case of one child, two years' free rental in the case of two children, and three years' clear rental in the case of three or more children, may be granted by the heir in possession, binding the succeeding heirs to make payment of the same out of the rents or proceeds of the entailed estate (s. 4). Provisions to children may now be made to affect the fee of the estate (1848, s. 21; 1853, s. 7). A similar provision may now also be made by the heir-apparent for his children (1868, s. 6), and by the heir in possession for the issue of any predeceasing child (1875, s. 10). These provisions to widows and children are commonly termed "Aberdeen provisions." Where two liferents already subsist, a third cannot take effect till one of the former have ceased (s. 3). The provision to children is only effectual to such children as survive the heir in possession, unless the provision form part of the marriage-contract funds of a predeceasing child (s. 5; *Chancellor's Trs.*, 1896, 23 R. 435); and where the estate is already burdened to the full extent of three years' free rental for children's provisions (granted under the Aberdeen Act, and not in virtue of a special power—*Loekhart*, 1853, 15 D. 914; *Eglinton*, 1863, 1 M. 386), no further exercise of the power will take effect until the existing burden on the estate has been reduced in amount (s. 6). Where any provisions exceed the statutory limit, they are reduced *quoad* such excess, but no further (s. 7), unless they are granted under special powers contained in the deed of entail (s. 12). An heir in possession has right to grant a bond of provision even though he has not made up his title, and the bond will be valid (*McAdam*, 1879, 6 R. 1256); but an heir whose title is defeasible by the birth of a nearer heir cannot validly make provisions (*E. Kinnoull*, 1869, 7 M. 576), though he may disentail (*Bruce*, 1874, 1 R. 740). The widow's right is made preferable by infestment to that of an adjudger of a succeeding heir's life-interest (*Boyd*, 1851, 13 D. 1302). The "free yearly rental" has been held to include feu-duties, even where the vassal was insolvent and the duty had not been paid for two years (*Carter Campbell*, 1895, 22 R. 260). In the case of duplicands of feu-duties, the average yearly value is taken (*Carter Campbell*). The "free yearly rental" also includes the royalties payable by the lessees of minerals for the year of the granter's death, irrespective of the probable exhaustion of the minerals in the near future (*Ld. Belhaven*, 1896, 23 R. 423, and cases there quoted); and "the estate" includes all the subjects that may be included in the entail (per *Ld. Pres. Boyle* in *Wellwood*, 1848, 10 D. 1485), including the interest of money held in trust to purchase additional land to be entailed (*Paterson*, 1888, 15 R. 1060), and of compensation money,—the rate of interest being taken as that actually being received at the granter's death (*Carter Campbell, supra*),—but not the mansion-house, offices, and policies (*Leith*, 1862, 24 D. 1059). The deductions authorised by sec. 1, in order to arrive at the "free rent" of the estate, do not include income-tax (*MacLaine*, 1845, 8 D. 150), nor personal debt of the heir in possession (*Cochrane*, 1846, 9 D. 173), but do include the interest on provisions granted



under the Act, or under a special power in the deed itself. But when a widow's annuity has not become immediately effectual against the estate, owing to the existence of a prior annuity at the granter's death, then the amount of the prior annuity is not a proper deduction from the free rent in estimating the value of the second annuity (*Morison*, 1894, 21 R. 538; *Boyd*, 1851, 13 D. 1302; *Brodie*, 1867, 6 M. 92; *Dunbar*, 1872, 11 M. 200). Where, under a special power, a husband was given a liferent of the whole estate, there was held to be no "free rent" (*Maitland*, 1849, 12 D. 416). In granting provisions to children, the power may be exhausted in favour of one child (*Antrobus*, 1830, 9 S. 70, *Paterson*, *supra*). A bond binding personal representatives in favour of children does not prevent the execution of a valid Aberdeen provision (*E. Bradalbane*, 1840, 2 D. 904, 944). A discharge may be granted by the children of their provisions, but in certain circumstances the right may revive (*D. Roxburghe*, 1881, 8 R. 862). The power to make children's provisions affect the fee of the estate, granted by the Rutherford Act (s. 21), does not apply where the provisions are granted under a special power inconsistent with the idea of the provisions affecting the estate (*Campbell*, 1854, 16 D. 396); but the terms of the special power must be very explicit to exclude this section (*Seymour*, 1859, 21 D. 361; *Hope Johnstone*, 1880, 8 R. 160; *Jardine*, 1891, 18 R. 870). The bond and disposition affecting the estate may be granted in favour of any person advancing the amount of the children's provisions (1853, s. 7), including the granter himself (*Robertson*, 1872, 10 M. 966), and may contain a power of sale (1853, s. 23), but can only be charged on the estate with the authority of the Court (1848, s. 23). The heir in possession is bound to keep down the interest on such bonds and dispositions, and the remedy competent to the creditor against the estate is limited to the principal sum and two years' interest thereon (1848, s. 22). Where an estate is disentailed, debts affecting it may, with the consent of the creditors, be transferred to another estate, entailed on the same series of heirs, to the extent to which said other estate may be lawfully charged with such debt (1882, s. 10; and see *Northesk*, 1882, 10 R. 77); while in estimating the amount of security to be given for family provisions, the rental is taken as at the date of the entail (*Glasgow*, 1896, 14 R. 59); and where the estate is sold under an order of sale, provisions to husbands, wives, or children are directed to be secured on the price of the estate (1882, s. 24); where the direction in a bond of provision for a widow was to pay the annuity half-yearly, beginning at the first term after the granter's death, the widow was held entitled to a full half-year's annuity at that term (*Carter Campbell*, 1895, 22 R. 260); and it was decided, in proceedings between the same parties, that it is incompetent for an heir in possession to present a petition to fix the amount of the annuity of the widow of a predeceasing heir (*Carter Campbell*, 21 R. 614).

### XIII. PROCEDURE IN ENTAILS.

The procedure in an action of declarator of irritancy (*Jurid. Styles*, iii. 68), or in an action of reduction (*Jurid. Styles*, iii. 84), of a deed constituting an act of contravention, which are the only actions competent to an heir-substitute for enforcing the conditions and provisions of the deed (*E. Bradalbane*, 1877, 4 R. 667; see Lord President, p. 672) or testing its validity (*Fairlie*, 1860, 22 D. 632), is the same as in ordinary actions of declarator or reduction. The declarator generally proceeds on the ground that the heir has by an act of contravention forfeited the estate (see *Bontine*, 1837, 15 S. 711); but apparently it is competent in such an action



to raise the question as to what the heir's powers really are, in view of an anticipated contravention (*Murray*, 1829, 7 S. 641). The actions of declarator and reduction may be laid together or separately, but the decree of irritancy must be obtained before insisting on the reduction (*Bontine*, 1823, 2 S. 106). The action may be raised by any substitute, however remote (*Dundas*, 1774, Mor. 15430), and may be defended by a third party who has derived right to part of the estate from the heir in possession (*Bontine*, 1823, *supra*); but it must be raised before the death of the contravener (*Gordon*, 1749, Mor. 15384; *Maxwell*, 1843, 6 D. 255, 5 Bell's App. 165); and the decree does not affect onerous deeds granted before the execution of the summons (Act 1848, s. 40). It is competent to purge an irritancy at any time prior to the decree, whether the contravention is of one of the conditions contained in the Statute of 1685 or in the deed of entail (*Abernethie*, 1837, 15 S. 1167, 1 Rob. App. 434; and see *Stewart*, 1859, 22 D. 72).

The petition to record a deed of entail has been treated under head IX. The petition is presented to the Junior Lord Ordinary; and where it is presented by the maker, institute, or heir in possession, no intimation is necessary, otherwise intimation is made on the institute (*Napier*, 1762, Shand, *Practice*, p. 1020, note 1).

The procedure in petitions for authority to exercise a power under the Entail Acts has, to a certain extent, been dealt with under head XII., particularly in discussing the power to disentail; and most of the recent decisions on such questions as the value of an heir-substitute's expectancy, the security to be given for debts affecting the estate, the effect of the deed of disentail when granted, etc., will be found quoted there. Any petition for authority to exercise a statutory power may be presented to the Junior Lord Ordinary, or to the Lord Ordinary officiating on the Bills (1875, s. 12 (1)); but petitions for certain powers may also be competently presented in the Sheriff Court. These are petitions for authority (1) to feu part of the estate for the erection of buildings (1868, ss. 3-5), for the erection of churches, etc. (1840, s. 1), and for purposes of science and general utility (1882, s. 6 (2)); (2) to grant leases in terms of any of the Entail Acts (1882, s. 5); (3) to borrow and charge for improvement expenditure under the Entail Acts of 1875 and 1878 (1882, s. 5); and (4) to examb portions of the entailed estate not exceeding 300 acres (1868, s. 14). The 4th section of the Act 1868 regulates the procedure in all petitions presented to the Sheriff as nearly as possible (1882, s. 5), and provides for intimation to the next heir of entail or his *curator ad litem*, and a remit to one or more men of skill to value and report, upon which the Sheriff, on consideration of the circumstances, is empowered to grant the prayer of the petition, subject to such conditions as he may see fit. The following specialties in petitions presented to the Sheriff may be noticed. Intimation is only necessary to the next heir, and apparently the petition can only be presented by an heir in possession who is capax and of full age—as the provisions of the Entail Acts allowing a curator to present a petition for an heir under disability, apply only to petitions to the Court of Session (1875, s. 12; 1882, s. 11). Also the decree pronounced in such a petition is final, unless appealed against within six months by a short note of appeal to one of the Divisions of the Court of Session, of which notice must also be given to the opposite party; and in the event of such an appeal, the judgment of the Court of Session is final and conclusive (1868, s. 4), and not subject to appeal to the House of Lords.

The procedure in entail petitions presented to the Court of Session is mainly regulated by the 12th section of the Act of 1875, and the Distribu-

tion of Business Act, 1857 (20 & 21 Vict. c. 56, ss. 4-6). The petition itself refers, in the first place, to the titles of the petitioner, then quotes the sections of the Entail Acts conferring the powers which the petitioner desires to exercise (these sections are usually quoted at length, but a reference to them may be sufficient). Then follows a statement of the circumstances under which the petitioner desires the authority craved, with a reference to the schedule of debts affecting the estate, and the names and designations of the next three heirs. After referring to the sections of the Entail Acts regulating the procedure, the petition closes with the prayer to the Lord Ordinary to grant the power craved (see *Jurid. Styles*, iii. pp. 477-531). The following points, in addition to those stated under head XII., may be noted: (1) *Curators*.—Any petition, except for power to disentail, may be presented by the tutor, curator, or guardian of anyone under legal incapacity from age or otherwise (1875, s. 12 (2); 1882, s. 11); and where the consent of any heir of entail is required, and he is incapable of giving such consent from legal disability, the Lord Ordinary may appoint one of his ordinary guardians, or any other person, to act as his *curator ad litem*: and such curator may competently consent, for his ward, to the prayer of the petition being granted (1882, s. 12), and no action will lie against him for failure in the performance of his office unless it be averred that he acted corruptly (*Maxwell Heron*, 1893, 21 R. 230). The appointment of a curator is usually made after intimation and service, and the expiry of the *induciae*. (2) *Intimation and Service*.—The Lord Ordinary may order advertisement to be made in the minute-books and on the walls in common form, and also in the *Edinburgh Gazette* and some other newspaper circulated in the county wherein the lands are situated, the name by which the lands are commonly known being sufficient description: and such service as he thinks proper, the *induciae* of which may be the same as upon summonses in terms of the Court of Session Act, 1868, s. 14, *i.e.* seven days where the party on whom service is to be made is within Scotland, and fourteen days where he is furth thereof (1875, s. 12 (4)). As a matter of practice, service is generally ordered on the next three heirs of entail, or on all if less than three exist, but it is only necessary that the petition should be served on the heirs of entail whose consent may be required (1848, s. 36; *Durys*, 1870, 9 M. 44). Answers may be lodged by any heir whose consent is necessary, by creditors of heirs-apparent who have borrowed on the security of their right of succession subsequent to 1 Aug. 1848 (1848, s. 10; 1882, s. 13), but not by creditors of other heirs unless the debt was contracted before 1 Aug. 1848 (1848, s. 9), nor by personal creditors of any heir (*Hepburn v. Davis*, 1868, 6 M. 1094). On sufficient security being given to a creditor for his debt, his opposition will be disallowed (*Hepburn v. Justier*, 1868, 6 M. 929). The Lord Ordinary has, however, a discretionary power to allow any person to appear for his interest. (3) *Schedule of Debts*.—The petitioner must produce an affidavit (1848, s. 6), or, in lieu thereof, a schedule (1875, s. 12 (5)), signed by himself and deponed to by him as correct, setting forth the full amount of all debts or provisions that may be made to affect the fee of the estate which are not secured by having been placed on record, and the names of the parties in right to the same. (4) *Consents*.—The consent of any heir of entail to the granting of the prayer of the petition must be in writing, and is irrevocable (1848, s. 50), though it may be reduced on the ground of fraud or essential error (*Menzies*, 1890, 17 R. 881; 1893, 20 R. (H. L.) 108). Consents may be competently given at any time in the course of the proceedings (1875, s. 5 (1); 1875, s. 6; 1882, s. 13). Where they are given, the Lord Ordinary will,

on being satisfied that the procedure has been regular and proper, pronounce an interlocutor giving effect to the terms of the consents. Where consents are refused, this must be stated either in the petition or by minute, and the Lord Ordinary can have the value in money of the expectancy of the heir ascertained: and on the said value being ascertained (*Baird*, 1891, 18 R. 1184) and paid into bank, or on proper security being given therefor over the entailed estate, he may dispense with the consent (1875, s. 5 (1); 1875, s. 6; 1882, s. 13). For the considerations to be taken into account in valuing consents, see XII. (1). (5) *Remits to Men of Business and of Skill*.—The Lord Ordinary may order any further procedure which he thinks proper, including the investigation into the circumstances by professional persons, or persons of science and skill (20 & 21 Vict. c. 56, s. 5). As a matter of practice, after the *indulcie* have expired, the Lord Ordinary in all cases remits to a man of business to report whether the procedure has been regular and proper and in conformity with the Entail Acts and relative Acts of Sederunt. Where the application raises questions as to the value of lands or of improvements, or of the value of the interests of heirs of entail, he will also remit to one or more men of skill, or to an actuary, to report. Such questions as the amount of feu-duty to be charged, and the terms of the feu-charter, are also proper subjects of a remit: and his final interlocutor will be framed in terms of such reports. (6) *Reclaiming and Appeals*.—Any interlocutor on the merits pronounced by the Lord Ordinary, if not reclaimed against within eight days, becomes final (20 & 21 Vict. c. 56, ss. 5 and 6). The reclaiming days on an interlocutor signed in vacation by the Junior Lord Ordinary are ruled by sec. 94 of the Court of Session Act, 1868 (*Grant Suttie*, 1883, 11 R. 3), but it is doubtful whether this section applies to interlocutors signed by the Lord Ordinary on the Bills (see Ld. Shand's opinion in *Grant Suttie*, *supra*). An appeal may be taken from the Inner House to the House of Lords; but all deeds granted at the sight of the Court are irrevocable unless so appealed against or challenged, by declarator or otherwise, within the time that such appeal is competent (1882, s. 29: and see *Fineastle*, 1876, 3 R. 345). They may be reduced at any time on the ground of fraud or essential error (*Monzie*, *supra*); but no interlocutor, judgment, or decree following on any petition is at any time reducible on the ground of want of compliance with the Entail Acts or any Acts of Sederunt, in so far as regards the matter set forth in the petition, the intimation service and advertisement thereof, the calling of parties thereto, the contents and productions of the affidavit, and, generally, the procedure therein; provided no injury have been suffered by any person, that the necessary consents have been obtained, that the petition has been served on any party expressly required by any Act to be called, and that the decree does not go beyond what was concluded for in the application (1853, s. 1). (7) *Amendment of Petition*.—A petition may be amended at any time, subject to such direction as the Lord Ordinary may think proper as to further intimation and service (1853, s. 3). (8) *Death of Petitioner*.—Should an applicant die, his personal representative, or his successor in the entailed estate, or his disponee, legatee, or assignee, may be sisted, and prosecute the application, if the petitioner's right has been specially conveyed to them (*Maxwell*, 1877, 4 R. 1112), except where consents are required to the application (1875, s. 12 (3); and see *Robertson*, 1864, 2 M. 1178). (9) *Disappearance of Heir in Possession*.—Where an heir in possession has disappeared for seven years and cannot be found, the next heir may make affidavit to that effect, and petition the Court to appoint a factor *loco absentis*, who may obtain



authority from the Court to disentail or sell the estate. The balance of the price, after satisfying the expectancies of any heirs whose consents may be required, will be paid into bank, or invested for behoof of the absent heir, and is then held to be moveable estate, subject to the provisions of the Presumption of Life (Scotland) Act, 1891. Where the heir in possession has disappeared for a shorter period than seven years, and a factor *loco absentis* has been appointed, he has the same powers as the heir himself to feu, lease, borrow, or charge for improvement expenditure (1882, s. 14, amended by the Presumption of Life Limitation (Scotland) Act, 1891, 54 & 55 Vict. c. 29, s. 8). (10) *Expenses*.—It is competent in any application to decern for payment of expenses against any of the parties, or out of the entailed estate or consigned money. Even if successful, a petitioner may be refused his expenses against opposing heirs, unless their opposition is unreasonable (*McDonald*, 1879, 6 R. 1011; 7 R. (H. L.) 41; *Pringle*, 1892, 19 R. 926): while he will be liable for all expense properly incurred by a *curator ad litem* to a minor heir (*Johnstone*, 1885, 12 R. 468). For the expenses of a petition to uplift consigned money in terms of the Lands Clauses Consolidation Act, ss. 79–81, see head XII. 2. (3).

[See McLaren on *Wills and Succession*, 3rd. ed., pp. 479–560; Rankine on *Landownership*, pp. 599–628, and 935–1045; J. P. Wood on *Entail Act*, 1882; Mackay, *Manual*, 552–560; Duncan on *Entails*; Duff on *Entails*; Sandford on *Entails*; Bell, *Prin.* ss. 1716–1774 c; M. Bell, *Lectures*, ii. 1004–1064; Ross, *Lectures*, ii. 503; Bell, *Com.* i. 43, ii. 178, 241; Stair, ii. 3. 43; More, *Notes*, lxxx, clxxvi, exe, cevi; Bankt. ii. 3. 133; Ersk. iii. 8. 22; Kames, *Equity*, 85, 148, 235; Duff, *Feudal Conr.* 334; Menzies, *Conv.* 728.]

See TRUST; SERVICE; POSSESSION; PRESCRIPTION.

**Entailed Estates (Applications as to Sheriff Court).**—With regard to entailed estates, the following proceedings are competent:—

I. *APPLICATIONS FOR POWER TO GRANT FEUS AND DISPOSITIONS FOR BUILDING PURPOSES*, under the Act of 1868, 31 & 32 Vict. c. 84.

The powers given by the Act override any prohibition or limitation which may be contained in the deed of entail or in any Act of Parliament (Act, s. 3), and are irrespective of the purposes for which the proposed buildings may be intended.

*What Lands may be feued or disposed.*—There is no power under the Act to deal with minerals or the right of working them; and gardens, orchards, policies, or enclosures, in connection with, and in so far as necessary to the amenity of, the manor place, are expressly excluded from the scope of the Act (s. 3).

Subject to these exceptions, an heir of entail in possession may apply to the Sheriff for power to grant building feus, and, but only where the estate is held on burgage tenure, dispositions subject to a ground-annual, of any part of the entailed estate (Act, s. 3). The application is to the Sheriff of the county in which the subjects are situated (Act, s. 4).

*Form of Application.*—No form of application is specified, but it is most conveniently made in the form given by the Act of 1876, 39 & 40 Vict. c. 70, and should specify the lands, the next heir, the conditions, and the annual payment on which it is proposed to feu or dispoise.

*What Payment for the Lands may be taken.*—The proposed payment, whether feu-duty or ground-annual, must represent the whole consideration



given, and any grassum, fine, or valuable consideration other than these will render the charter or disposition null and void (Act, s. 3).

*How Value ascertained.*—On the application being made, the Sheriff directs notice, in such manner as he thinks proper, to be given to the next heir of entail (if under age or subject to any legal incapacity, the Sheriff appoints a tutor or curator *ad litem*), and remits to one or more skilled men to report whether the subjects fall within the exceptions already mentioned or not, and as to their value (Act, s. 4).

*Decree.*—If the report is to the effect that the subjects are proper for the purpose, and that the proposed consideration is adequate, the Sheriff grants authority (which is available to any succeeding heir of entail (45 & 46 Vict. c. 53, s. 6 (3)) at any time within ten years to feu or dispose accordingly, for such consideration, not being less than the rate fixed by the skilled reporters, as is obtainable, subject to such conditions as the Sheriff may think essential or fit (Act, s. 4); but no longer subject to the nominal tax of one penny in lieu of casualties of entry (37 & 38 Vict. c. 94, s. 23).

*Charters and Dispositions.*—The decree is authority to the heir of entail to grant the necessary feu-charter or disposition, which, being recorded in the Register of Sasines, becomes effectual to all intents and purposes (Act, s. 4). The feu-charter or disposition must contain a stipulation that buildings of at least double the value of the annual payment (see *McLagan*, 1896, 34 S. L. R. 18) shall thereafter (*Stewart*, 1882, 9 R. 458) within the next five years be erected on the lands feued or disposed, and kept in good tenantable and sufficient repair (Act, s. 5).

*Appeal.*—The only mode of reviewing the Sheriff's decree is by note of appeal to the Court of Session (which must be taken, and written notice thereof given to the opposite party, within six months, otherwise the decree becomes final), where it is disposed of as a summary cause. The decision of the Court of Session is final (Act, s. 4).

II. *APPLICATIONS UNDER THE ACTS OF 1840 AND 1882.*—In addition to the general powers given by the Act of 1868, special powers for feuing churches, burying-grounds, schools, play-grounds, and ministers' and schoolmasters' houses and gardens are given by the Act of 1840 (3 & 4 Vict. c. 48, s. 1), and for scientific or other purposes of public utility by the Act of 1882 (45 & 46 Vict. c. 53, s. 6 (2)), the procedure in both cases being that of the Act of 1868, *supra*, art. I.).

III. *APPLICATIONS FOR POWER TO GRANT LEASES OF ENTAILED LANDS.*—In addition to the right of an heir of entail, on his own authority, to lease lands for a period not exceeding twenty-one, and minerals for not more than thirty-one, years, a general power is given him by the Entail Act of 1882, 45 & 46 Vict. c. 53, s. 5, to make in the Sheriff Court any application as to leases longer than these, competent by any of the Entail Acts, in the same manner and on the same terms and conditions as an application under the Act of 1868.

Applications for power to lease under 10 Geo. III. c. 51, ss. 4 and 5 (Montgomery Act), and 11 & 12 Vict. c. 36 (Rutherford Act), are therefore competent.

The provisions of the Act of 1868, *supra*, art. I., extend to leases of ninety-nine years, and those of the Acts of 1840 and 1882, *supra*, art. II., also include leases.

IV. *EXCAMBION.*—An heir of entail in possession may apply to the Sheriff of the county within which the entailed estate is situated for authority to exchange not more than three hundred acres, lying together in one place, for an equivalent in land (31 & 32 Vict. c. 84, s. 14). The Sheriff

remits to two or more skilled persons to inspect the lands, adjust the value, and settle the marches. On their reporting that a fair exchange is contemplated, the Sheriff authorises it to be made by a contract of excambion, which, being executed, and, within three months, recorded in the Sheriff Court Books, the land given off becomes freed of the entail, and the land taken in exchange becomes part of the entailed estates (10 Geo. III. c. 51, ss. 32, 33).

V. *IMPROVEMENTS*.—Applications for power to borrow and charge for improvements under the Entail Acts of 1875 and 1878 are competent by the Entail Act of 1882 (in the case of all entails), and are made as nearly as may be like applications under the Act of 1868, *supra*, art. I.: 45 & 46 Vict. c. 53, ss. 4, 5, 6; 38 & 39 Vict. c. 61, ss. 7, 8; 41 & 42 Vict. c. 28, ss. 3, 4.

The application may be made in two sets of circumstances: 1st, where the improvements have already been made, and, 2nd, where they are in course of construction, or in contemplation. Where they have already been made, the Sheriff must satisfy himself, by such evidence as he thinks reasonable, that they are substantial and of at least the value of the sum sought to be borrowed, and that this sum represents the cost of them; vouchers need not be produced, but the Court, or anyone to whom the matter has been remitted by the Court, may order production of them; and the granting of the application ends the process. When in course of construction or contemplated, the Sheriff must be satisfied that they will be substantial and of probable benefit to the estate, and the cost, which is the amount to which authority to borrow will be granted, is fixed by estimate of one or more persons of skill. The lender consigns the money in bank under orders of the Court, which makes such orders as it thinks necessary from time to time for the inspection and proper carrying out of the improvements; and, on motion made, for payment to the applicant, out of the consigned money, of such sums as he may have paid or be liable for, for the improvements; and the process subsists till the whole sum has been so paid away (Act of 1875, s. 7).

In fixing the amount to be borrowed, the cost of the application, and of obtaining the loan and granting security therefor, must in all cases be added to the estimated cost of the improvements (Act of 1875, s. 7).

[Dove Wilson, *Practice*, pp. 412–421.]

**Entry with Superiors.**—This is the complete substitution of a new vassal for an old vassal, either in the person of an heir or a singular successor. It is a necessity of the feudal tenure, and arises from the fact that the radical right in all feudal subjects being in the superior, recourse must be had to him in all such cases. By Statute, entry with a superior is now in most cases implied, but the older law must first be shortly stated.

Under it a superior was bound to enter a vassal who produced his proper titles and tendered payment of the entry-money due under the original charter. The course followed was to grant a charter of resignation or of confirmation, or of resignation and confirmation, or of confirmation combined with a precept of *clare constat*, or of adjudication, or of sale, or a writ of resignation, or of confirmation, or of investiture, or a charter of novodamus, or a precept or writ from Chancery, or of *clare constat*, or a writ of acknowledgment. When the new vassal received this deed from the superior, he was discharged of all casualties of relief or composition, and

when he recorded it in the appropriate Register of Sasines his infeftment and his entry were complete. He became the vassal liable in all the obligations of the feu, and the old vassal was entirely discharged thereof.

By the Conveyancing (Scotland) Act, 1874, s. 40, this procedure is abolished to a large extent, and active intervention by the superior is now unnecessary. If the new vassal now record his title in the Register of Sasines, his infeftment and entry are complete. By the same section, however, there are provisions that the prior vassal is to remain liable for all the obligations of the feu until notice has been received by the superior of the change of ownership, and that the superior may proceed against him, or against the new vassal, in his option. There is also reserved to the superior all his right to casualties or feu-duties, or arrears of feu-duties, due at or prior to the date of the implied entry, and all his rights and remedies for recovering these.

The Act, s. 4 (1), however, still allows the old procedure to be adopted in the case of charters of novodamus, or precepts or writs from Chancery, or of *clare constat*, or writs of acknowledgment. These were excepted from the general abolition of charters and writs from the superior, on account of their affording a simple and inexpensive mode of completing an entry; but it is understood that, in practice, they are now seldom applied for.

Distinctions must be noted in the case of (1) an heir, (2) a singular successor.

(1) An heir entering was bound, if required, to produce to the superior a service as heir to his predecessor in the particular character pointed out by the investiture,—that is, by the charter in virtue of which the *dominium utile* is held of the superior,—and to pay the casualty of relief. See SUPERIORITY. He still must have the service, but it is sufficient to record it in the appropriate Register of Sasines.

(2) A singular successor had to produce to the superior the disposition in his favour, and pay the casualty of composition. See SUPERIORITY. Now, if the disposition is recorded, his entry is complete. He still, however, remains liable for the composition.

[Begg, *Conveyancing Code*, pp. 185, 306; Bell, *Lectures on Conveyancing*, p. 1140.]

## Episcopal Church in Scotland.

### HISTORY OF DIFFERENT CLASSES OF EPISCOPAL CHURCHES IN SCOTLAND.

The Protestant Episcopal form of Church government existed in Scotland between 1572 and 1592, when the Presbyterian, introduced at the Reformation between 1560 and 1567, was re-established by the Act 1592, c. 116; in 1606, Episcopacy was restored by the Act 1606, c. 2; but Presbytery again took place in 1638, when the General Assembly of Glasgow deposed the bishops. At the Restoration, Episcopacy was re-established by 1662, c. 1; and finally, at the Revolution Settlement in 1689, Presbytery was declared to be, and still continues, the Established or State Church of Scotland, 1689, c. 3, and 1690, c. 5. The Presbyterian Establishment retains the portion unappropriated by the Crown and owners of land of the estates, tithes, and revenues formerly held by the Roman Catholic Church, whose exorbitant wealth was a subsidiary cause of the Reformation. It is the only Church recognised by the Constitution or officially by the Crown and its representatives.



The Episcopal Church, however, continued and still exists, in two forms, one of which is the lineal descendant of the Episcopal Church established for certain intervals under the Stuart kings, but now dis-established, while the other consisted of a few individual churches authorised by the Toleration Act (10 Anne, c. 7) for the use of congregations at first consisting chiefly of English residents or visitors in Scotland. These are now reduced to one, St. Peter's, Montrose; but there were at one time others, as St. Paul's, Aberdeen, and St. James's, Aberdeen, an offshoot from St. Paul's, and St. John's, Perth, which have all now become united with the Scottish Episcopal Church. These churches did not acknowledge the bishops of the Scottish Episcopal Church, and received the services of bishops of the Church of England. A third class of Episcopal churches originated from recent secessions of a few individual ministers, usually carrying their congregations, or most of them, with them from the Scottish Episcopal Church, of which St. Thomas's, Edinburgh, formed by the Rev. T. K. Drummond in 1842; St. Vincent's, Edinburgh; St. Jude's and St. Silas', Glasgow, were the chief. This class called themselves English Episcopal, and an attempt, very partially successful, was made to unite them with the older English churches in Scotland, in order to procure for them the confirmation and services of an English bishop.

When the Scottish Episcopal Church was gradually relieved of its disabilities and recognised as in full communion with the Church of England, as will be presently noticed, the position of the third class of Episcopal churches ceased to be tenable. The Convocations of the Provinces both of York and Canterbury passed in 1877 resolutions condemnatory of a Colonial Bishop, Bishop Berkles, who had come to Scotland to confirm members of seceding Episcopal congregations. In 1878 the Lambeth Conference of Bishops of the Anglican Communion recognised the Scottish Episcopal Church as in full communion with the Church of England and the other Churches represented at the Conference.

A considerable number of the members of the first class, or proper Episcopal Church of Scotland, espoused, or at least sympathised, with the Jacobite cause until the failure of the '45 rising, and many of them, having refused to take the oaths of abjuration and allegiance (from which they were called Non-Jurors), or to pray for the sovereigns of the House of Hanover, were proscribed by a series of Acts during last century. This series of Acts, and the reverse series passed in the present century repealing the penalties and disabilities by which the proscription of the Scottish Episcopal Church was enforced, represent the legal history of that Church, and the attitude of the State towards it. Like all Churches not established by law within the State where they exist, the legal constitution of the Episcopal Church in Scotland now depends on the contract or agreement of its members, which, as to the whole Church, is determined chiefly by the Code of Canons, and, as to individual churches, by that Code and the documents containing their separate constitutions, framed in conformity with the provisions of the Canons.

#### THE LEGISLATION RELATIVE TO EPISCOPAL CHURCHES AND THEIR CLERGY.

While the constitution of the Episcopal Church is thus self-originated and not statutory, the limits within which, and the conditions under which, the whole Church and its individual congregations, like other quasi-corporate bodies, may act in matters not spiritual or purely ecclesiastical, but having civil or pecuniary consequences, are regulated by the law of the land, and it is still necessary to refer to the Statutes to show its exact position in its legal relations.



By chapter 12 of King William's First Parliament, 1695, "all outed ministers," by which term were meant those who had not accepted the Presbyterian Establishment, and so lost their cures, were prohibited from baptizing children or solemnising marriages, under pain of imprisonment until they found caution to go out of the kingdom and never to return. There was no prohibition against other services, and many Episcopal clergymen continued to minister in private houses, secret meeting-places, and in some few instances in churches such as Kilmonivaig, Blair Athole, not used by the Established Church. In a few instances the two churches, as Glen Rosen in Angus, shared for a time the use of the church. Many of the clergy, however, neither took the oath to the sovereign nor prayed for the royal family.

In 1711, by an Act of Queen Anne (10 Anne, c. 7), the Statute of 1695 was repealed, and it was declared lawful for those of the Episcopal communion in Scotland to attend divine worship after their own manner. But no one was to officiate in this worship who was not ordained by a Protestant bishop, or who did not take the oaths of allegiance to Queen Anne and of abjuration of the Pretender. Their meetings for divine worship were to be held with open doors, and all ministers were at some time in divine service to pray for Queen Anne, the Electress Sophia of Hanover, and the royal family.

The favour shown by many of the Episcopalian clergy and laity for the Jacobite rising in 1715 led, in 1718, to the Act 5 Geo. I. c. 29, which required all ministers of Episcopal congregations to take the oath of allegiance to King George, and of abjuration of the Pretender, and every Episcopal congregation to pray in express words for the king and the royal family. It was followed, after "The '45," in 1746, by the more stringent Act 19 Geo. II. c. 38, "to prevent pastors and ministers from officiating in Episcopal meeting-houses in Scotland without duly qualifying according to law; and to punish persons for visiting any meeting-house where such unqualified pastors or ministers shall officiate." The Sheriffs were to inquire and report to Parliament the number of Episcopal meeting-houses.

In order to qualify, Episcopal ministers were required to produce certificates of having taken the oaths to the sovereign, for registration by the Sheriff Clerk, and these certificates, after registration, were to be affixed to their meeting-houses. They were also required to pray for the king and royal family. Failing such a certificate, the meeting-house was to be closed, and a minister who had not qualified by taking the oaths and praying for the king, was liable to six months' imprisonment for a first, and transportation for any subsequent, offence. Laymen who frequented such meeting-houses were also liable to penalties. No Letters of Orders were in future to be recognised except from bishops of the Church of England or Ireland. Peers who attended unregistered meeting-houses were disqualified from voting at the election of Representative Peers, and other persons who did so were disqualified from voting or being voted for at parliamentary elections. Civil and military officers so attending were disqualified from office for a year after conviction. In 1748 this severe Act was further explained and enforced by 21 Geo. II. c. 34.

Nearly half a century later, in 1792, when the danger of a Jacobite Rebellion had ceased, the first Relief Act (32 Geo. III. c. 63) was passed, by which—

(1) The penalties, forfeitures, and disabilities imposed for resorting to, or officiating at, an Episcopal meeting-house by 10 Anne, c. 7, 5 Geo. I. c. 29, 19 Geo. II. c. 38, and 21 Geo. II. c. 34, were repealed.

(2) A modified declaration and the subscription of the Thirty-Nine Articles were substituted for the old oaths of allegiance or abjuration, of which certificates were to be taken out as formerly, but the penalty for non-compliance was limited to £20 for a first offence, and the incapacity of officiating for three years for a second. Some minor disabilities were retained, and ministers not taking the certificate still forfeited the parliamentary franchise. Episcopal ministers were disqualified from holding benefices in England unless ordained by an English bishop, and the disqualification for voting or being voted for in parliamentary elections still affected persons who were present at meeting-houses where the sovereign was not prayed for.

Soon after the accession of Queen Victoria in 1840, the disqualification of Scottish Episcopal clergy from holding English benefices, though not entirely, was practically removed by the provision that bishops of England and Ireland might admit them, provided they brought letters commendatory from the bishop in Scotland from whose diocese they came (3 & 4 Vict. c. 33). Further relief was given to the Episcopal clergy, in 1864, by an Act (27 & 28 Vict. c. 94) which repealed the ninth section of the Act of 32 Geo. III. c. 63, requiring that they should be ordained by an English or Irish bishop in order to hold benefices in England, and thereby recognised the orders conferred by the Scottish bishops, but still required the consent of the bishop of the English diocese into which they came (s. 5). Any person admitted to holy orders by a Scottish bishop, who officiated more than once in three months in an English diocese without consent of its bishop, was liable to forfeit £10 to the Governor of Queen Anne's Bounty (s. 8).

#### THE DIOCESAN BISHOPS AND PRIMUS AND THEIR SEES.

There are at present seven dioceses and bishops in the Scottish Episcopal Church. 1. Edinburgh; 2. St. Andrews, which includes the old bishopries of Dunkeld and Dunblane; 3. Aberdeen; 4. Argyre and the Isles; 5. Brechin; 6. Glasgow, which includes Galloway; 7. Moray and Ross. One of the bishops is elected Primus by the diocesan bishops (sometimes called the College of Bishops, although the name has been dropped in the Canons of 1890) in Episcopal Synod, and the Primus presides at all other meetings of the bishops when present, with a deliberative as well as casting vote (Canon 2 of 1890, s. 4). He is bound to reply to any application for advice made by any other bishop, and is designed "Most Reverend," while the other bishops are designed "Right Reverend." The designation of Primus was introduced by the Canons of 1890, but the Synod declined to give him the title of Metropolitan. He has no Metropolitan jurisdiction similar to that of archbishops, and no power or prerogative except what is expressly conveyed to him by the Canons. In *Dunbar v. Skinner*, 1849, 11 D. 945, it was said by Ld. Fullerton, "The jurisdiction of a bishop of the Protestant Episcopal Church in Scotland has no existence." But by this is meant direct jurisdiction proceeding from the sovereign, which belongs only to the Courts of Established Churches. Prorogated jurisdiction, arising from agreement or submission of the members of this or any other non-established Church, was not disputed in that case to be possible for a bishop as well as any other ecclesiastical officer or body. The Court ordered, in a case in 1809, the designation of Bishop of the Episcopal Communion in Scotland to be deleted from a summons; but it is thought this decision would not now be followed (*Drummond v. Farquhar*, 6 July 1809, F. C.).

## THE CANONS OF THE EPISCOPAL CHURCH.

The present constitution of the Episcopal Church principally contained in the Code of Canons enacted by a General Synod of the Church on 7th October 1890. There were prior Codes framed in 1743 by an Episcopal Synod at Edinburgh, and by General Synods of the Clergy, 1811, at Aberdeen, in 1828 at Laurencekirk, and in 1838, 1863, 1876, at Edinburgh. It may be necessary, however, to refer to the Articles and the Prayer-Book of the Church of England and other subsidiary documents referred to in the Canons, and to the practice of the Church, in order to ascertain what is the law of the Church on particular points. But there does not appear any good reason for the Lord Chancellor's doubt in the case of *Forbes v. Eden* (1 L. R. Sc. & D. App. p. 576), that the Canons, to which every clergyman on institution to a charge, or receiving a licence as deacon or priest, promises obedience, form a part, and the principal part, of the constitution or fundamental contract of the Church. The present Code of 1890 is a revision of the Code of 1876, and was declared by the General Synod, as now revised, amended, and enlarged, to be in future the Canons and Laws of the Episcopal Church in Scotland.

These Canons deal with the threefold orders of ministry,—bishops, priests, and deacons,—the mode of their appointment and their duties (i.-xii.); the formation and regulation of pastoral charges or incumbencies and missions, and of appointments to these (xiii.-xxi.); the offices of dean and diocesan synod clerk, the lay officials of the diocese and the Church, and the three kinds of Synods,—Diocesan, Episcopal, and Provincial,—a name substituted for General Synod in the Canons of 1890 (xviii.-xxxii.); the services of the Church (xxxiv.-xliii.); the registers to be kept by the clergy (xliv.); the Representative Church Council (xlv.); the procedure in the case of accusations against bishops, priests, or deacons (xlvi.-l.); and the interpretation of the Canons (li.).

THE CASE OF *FORBES v. EDEN*.

The authority and position of such Canons in relation to the law of Scotland and the Civil Courts was considered in the case of *Forbes v. Eden*, 1865, 4 M. 143; affd. L. R. 1 Sc. & D. App. 568), brought by the Rev. George Forbes, Episcopal incumbent of the church at Burntisland, before the Court of Session, to reduce the Canons of 1863, as *ultra vires* of the General Synod held in that year, "except in so far as might be in conformity with the constitution and practice of the Church at the period of his ordination." No pecuniary damage, except in a subsidiary conclusion of the summons afterwards referred to, was alleged, and no injury to the pursuer's status as clergyman of the church at Burntisland was averred. The case was decided by the L. O. Barcapple, the Inner House, and the House of Lords, upon the ground that unless there is such averment the Court will not inquire into the acts of a Voluntary religious association, acting by the proper Church Court or Official.

The Lord Chancellor and Lord Cranworth also entered into the particular grounds of objection by Mr. Forbes to the alterations made by the Canons of 1863, which related to (1) the use of the Scottish form of the communion office, which had been declared of primary authority in the Canons of 1838, while by Canon 30 of 1863 the English form was to be read "at all consecrations, ordinations, and Synods": and while the right of congregations using the Scottish form was reserved, it was no longer declared "of primary authority"; and also (2) that the Book of



Common Prayer was by Canon 29 of 1863 declared to be "the service book of the Church for all purposes to which it is applicable," while in Canon 28 of 1838 it was only said that, "in the performance of morning and evening service, the words and rubrical directions of the English Liturgy shall be strictly adhered to."

In regard to the first of these points, the above judges held there was no uniform practice prior to the Canons of 1863; and as regards the second, that the form of the Church of England Prayer-Book had been used in the Scottish Episcopal Church, and is referred to in the Canons of 1838, for the services of baptism and visitation of the sick, the two services which the appellant specially founded on as altered by the effect of the Canons of 1863. In any view, they held the alterations made were within the power of alteration reserved by Canon 33 of 1838 to a General Synod, "to alter, amend, and abrogate the Canons in force, and to make new Canons."

As this Canon is repeated by sec. 20 of Canon 32 in the existing Code of Canons of 1890, these opinions are of importance as regards the power of alteration by the Synod under the Canons. But the point decided was that the Civil Court has no jurisdiction to inquire into the merits of acts, decisions, or sentences of the appropriate ecclesiastical body or authority according to the constitution of a non-established Church, unless pecuniary or patrimonial damage is alleged, and, if the case went to proof, is proved.

#### THE CIVIL COURT'S JURISDICTION CONFINED TO CIVIL CONSEQUENCES.

It has been for some time a settled rule of Scottish as well as English law, that the jurisdiction of the Civil Courts with reference to matters connected with non-established Churches will not be exercised, except as to their civil or pecuniary consequences. This is shown by the cases in which inquiry has been refused (*Forbes v. Eden*, *supra*; *Oliver v. Skerret*, 1896, 23 R. 468), as well as those in which it has been allowed in a case of diversion of property from its destination (*Craigdallie v. Aikman*, 1 Div. App. 1; *Smith v. Galbraith*, June 1839, F. C.; *Attorney-General v. Pearson*, 7 Sim. 290; *Attorney-General v. Shore (Lady Hewley's Charity)*, 7 Sim. 309); deprivation of status, involving loss of emoluments (*Macmillan v. Free Church*, 23 D. 1314); injury to character by libel (*Dunbar v. Skinner*, 11 D. 905). Mr. Forbes, the pursuer in *Forbes v. Eden*, aware of this position of the law, averred in a subsidiary part of his case that he had suffered damage by the refusal of a licence to his curate, to whom he was liable for salary. But this was decided against him, on the ground that if the licence was wrongfully refused, the bishop who refused it, and not the Synod, was the proper party to sue.

One of the cases above referred to, *Dunbar v. Skinner*, in which inquiry was allowed, concerned the Scottish Episcopal Church, and, along with the Free Church case of *Macmillan*, is important as showing the furthest length the Scottish Courts have gone in sustaining their jurisdiction to inquire into the acts of the authorities of non-established Churches, though in fact the inquiry was not held, as both cases went off on other grounds. *Dunbar's* case was settled, and *Macmillan's* was dismissed, as brought against the wrong parties. But it must be observed that the decision in *Dunbar*, where the alleged libel was contained in a sentence of excommunication by Bishop Skinner of Aberdeen against Sir William Dunbar, who had become a clergyman of the Episcopal Church under a special agreement, which he alleged the bishop violated, but before sentence withdrew, was based on the assumption of Sir W. Dunbar's withdrawal



from the Scottish Episcopal Church, so that he was no longer subject to the bishop of that Church (see issues, 13 D. 1217).

The case of *Macmillan* was ultimately dismissed, upon the unsatisfactory ground that the proper parties had not been called. The judgment sustaining the jurisdiction was based on the ground that the sentence of deposition had been pronounced contrary to the provisions of the constitution of the Free Church, and that damages were concluded for. In the more recent case, in the United Presbyterian Church, of *Oliver v. Skerret*, 1896, 23 R. 468, where the claim for reinstatement in the office of a minister was not insisted in, and there was no claim of damages, it was held the Court would not entertain a mere reduction. *Skerret's* case appears to have been badly pleaded, for the summons should have concluded for damages, failing reinstatement; and the decision as to the incompetency of a reduction is doubtful. Reduction, which is a negative declarator, was always a competent remedy by the law of Scotland, without further petitory conclusions. If the pursuer had bound himself to bring, instead of merely reserving a right to raise, an action of damages, there seems no good reason why he should not have had the grounds on which he sought reduction, if relevant, inquired into and decided. This decision is another example of the unwillingness of the Civil Court to examine ecclesiastical sentences. The opinion of the Lord Ordinary Kincairney, not expressly dealt with in the Inner House by counsel and the Court, but understood to be admitted, was that the Civil Court would not reinstate a minister to an office of which he is deprived by the ecclesiastical authorities of his Church, even if he was entitled to damages. The Court decided in another recent case, that funds which would have belonged to an Episcopal congregation in Brechin, which had been licensed under the Acts of 1746 and 1748, but had ceased to exist, now belong to the Scottish Episcopal congregation there, and not to the United Presbyterian congregation, although it was averred the majority of the licensed Episcopal congregation joined the relief congregation, now united with the United Presbyterian (*Burnett*, 1888, 15 R. 723).

The present position of the law with regard to disestablished Churches restricts to so limited an extent the jurisdiction of the Civil Courts with reference to matters ecclesiastical, that few cases have been raised, and these in so limited a sphere that there are very few decisions of the Court of Session which concern the Scottish Episcopal Church.

#### CASES IN WHICH THE CIVIL COURT HAS EXERCISED JURISDICTION IN MATTERS RELATING TO THE SCOTTISH EPISCOPAL CHURCH.

There is no express exclusion of the jurisdiction of the Civil Courts either generally or as to special matters, as has been attempted by the rules of other non-established Churches, *e.g.* the United Presbyterian (Rule 11. 9. 2.), against suing for stipend (*Skerret v. Oliver*, 23 R. 4802), and the Free Church, in its Model Trust Deed, as to the property in its churches.

Consequently, in any matter of proper civil jurisdiction involving pecuniary consequences, the clergy or laity of the Episcopal Church may appeal to the Courts in Scotland; but these Courts, according to the rules already explained, decline to decide any point of doctrine, or worship, or ecclesiastical government, or discipline for which the Episcopal Church has itself provided appropriate tribunals in its Synods. The Court has, however, decided a question as to the title to a manse or house for an Episcopal clergyman, for which land had been left under certain limits (*Pearson v. Malachi*, 20 R. 167); as to the title of an Episcopal clergyman to possess

a parsonage (*Macleaun*, not yet reported); as to the right of a canon of a cathedral to a salary (*Brook v. Kelly*, 1893, 20 R. (H. L.) 104). It appointed trustees to administer a bequest to the poor of Scottish Episcopal congregations (*Low and Others*); has answered questions with reference to the Walker Trust, whose private Act, 1877, authorised by sec. 19 a petition for directions to the trustees to be presented to either Division of the Court in the event of "any question or difficulty arising as to the construction of the trust deeds or of this Act, or as to the proper operation or administration of the trust, or in consequence of any other special fact or occurrence" (*Petitions, Walker Trs.*, 25 Nov. 1878, and 13 Aug. 1896). The questions raised included *inter alia* the power of the Cathedral Board not to exact seat rents, and its power to allow a retiring allowance to one of the instituted clergy. It recently decided the forfeiture of a legacy left for the stipend of a clergyman of an English Episcopal church at Aberdeen, left on the condition that the congregation was not united or connected with the Scottish Episcopal Church. Such connection was held established by the majority of the Court (Lords President and Kinnear, McLaren dissenting, and reversing Kyllachy) when the clergyman accepted a licence from the Scottish Episcopal bishop of the Diocese, and that bishop confirmed members of the congregation with the tacit consent of the congregation (*Bannerman v. Mackay*, 1865, 4 M. 45: 1896, 23 R. 949).

It has also sustained its jurisdiction in a question between a heritor who had granted a feu for an Episcopal church, on condition that service should be always maintained in it, and the trustees, in whose favour it was granted, whether the condition had not been fulfilled and an irritancy incurred (*Macleaun*, 1896, not reported, and still pending).

The church property of the Episcopal, like other non-established Churches, cannot be held by the Church itself, as it is not a corporation recognised by law, but is vested in trustees for it. The trustees of the property of an Episcopal church are usually certain officials of the diocese, along with certain officials or representative office-bearers of the church, and in that case it passes to their successors in office, under the provision of 13 Viet. c. 13. When, by the constitution of the Episcopal church at Melrose, the trustees were four laymen, and the Right Reverend W. J. Harrison, presently Bishop of the Diocese of Glasgow, and his successors, in trust, and Melrose was thereafter transferred from the Diocese of Glasgow to the Diocese of Edinburgh, the Court authorised the conveyance by the existing trustees to the former lay trustees, and the Bishop of Edinburgh and his successors in office, so long as the church should be situated in the Diocese of Edinburgh, and thereafter the bishop to whose diocese it may belong (*Harrison and Others*, 1893, 20 R. 827).

#### THE RULE AS TO THE INTERPRETATION OF THE CANONS.

With regard to the interpretation of the Canons, the Code of 1890, sec. 51, provides that "they shall in all cases be construed in accordance with the principles of the law of Scotland. Nevertheless, it shall be lawful, in cases of dispute or difficulty concerning the interpretation of their canons, to appeal to any generally recognised principles of canon law." This was an alteration of the earlier Canons, in which the primary rule of interpretation had been the general principles of the canon law. By canon law was meant the Roman canon law contained in the *Corpus Juris Canonici* (see article CANON LAW), in so far as not inconsistent with the altered circumstances of a Reformed Church no longer subject to the jurisdiction of Rome. The appeal to the canon law in the interpretation of these Canons is not often

made, and when made, as in an appeal to the Episcopal Synod with reference to an election to the Bishopric of Argyle, it has not generally been successful. For all ordinary cases the principles of the civil law of Scotland would, as regards procedure and evidence, in so far as not inconsistent with the Canons, it is thought, be followed. There have been few such accusations, and in recent times the only important cases were the trials of Bishop Forbes of Brechin, before the Episcopal Synod, in 1159–60, MS. Register of Episcopal Synod, ii. 417 and 436–51, and the Rev. Patrick Cheyne of Aberdeen, in 1858, before the Bishop of Aberdeen, and on appeal before the Episcopal Synod, MS. Register, ii. 343, 360, 410, 431, and iii. 313, for erroneous doctrine. There have also been a few cases of accusations of immoral conduct, but these have usually been settled without the scandal of a public trial.

#### THE REPRESENTATIVE CHURCH COUNCIL.

The General Synod of 1876 instituted the Representative Church Council, in which both laity and clergy are represented, for the administration of the financial affairs of the Church. It meets annually in the second week of October.

Canon 45 of 1890 provides that “the Representative Church Council is recognised as the organ of the Church in matters of finance, but shall not deal with questions of doctrine and worship, nor with matters of discipline, save to give effect to canonical sentences of the Church.” It was held, in an arbitration between Mr. J. Auldjo Jamieson and the Publication Committee of the Representative Church Council, by the arbiter, Sheriff Mackay, that the conduct of *The Scottish Guardian*, an ecclesiastical newspaper devoted to the interests of the Scottish Episcopal Church, so as to involve the Council in indefinite pecuniary liabilities for its cost, and legal liability for the matter inserted in it, was *ultra vires* of the Representative Council under its present constitution (*Scottish Guardian*, 8 Feb. 1895).

Erskine's *Inst.* i. 1. 5. 5; Taylor Innes on *Creds*; Mackay's *Manual of Practice*, ch. xii. p. 105; Grub's *Ecclesiastical History of Scotland*, 1861; Stephen's *History of the Church of Scotland*, 1895–6; *Canons of the Episcopal Church*, 1890.

**Equalising Dividend.**—1. *In Sequestration.*—To entitle any creditor to payment of a first dividend, he must produce his oath and grounds of debt at least two months before the time fixed for payment of the dividend, when such time of payment has not been accelerated, or one month where it has; and to entitle him to payment of any subsequent dividend, he must produce his oath and grounds of debt at least one month before the time fixed for payment (19 & 20 Vict. c. 79, s. 123; see *Wright*, 1842, 5 D. 164; *Forbes*, 1851, 13 D. 1272). But by failure to lodge his claim timeously for the first dividend, a creditor does not entirely forfeit his right against the bankrupt estate for the amount of the dividend. If he produces his claim in time to share in the second dividend, he is entitled, on occasion of payment of it, to receive out of the first of the fund (if there be sufficient for that purpose) an equalising dividend corresponding to what he would have drawn if he had claimed in time for



the first dividend; and the same rule applies to all subsequent dividends (19 & 20 Vict. c. 79, s. 123).

2. *In Cessio*, it is provided that "Creditors who fail to lodge their claims in time for a first dividend shall, if they do so in time for a subsequent dividend, be entitled to an equalising dividend, as well as to the new dividend upon the amount of the claim that may be sustained" (A. of S. 22 Dec. 1882, s. 7).

Where assets belonging to a sequestrated debtor are situated abroad, and are the subject of a bankruptcy process in the foreign country, a creditor drawing dividends under the foreign bankruptcy must, as a condition of claiming also in the sequestration, submit to be equalised with the other creditors in the sequestration, by communicating to them the amount of the foreign dividends he has received (*Stewart*, 1851, 13 D. 1337; *Lindsay*, 1840, 2 D. 1373; *Ord*, 1847, 9 D. 541; *Barr*, 1879, 7 R. 247; *Clydesdale Bank*, 1890, 27 S. L. R. 493; see *Selkirk*, 2 Rose, 291; *ex parte Robertson*, 20 Eq. 733; *Banco de Portugal*, 5 App. Ca. 161; *ex parte Wilson*, 1872, L. R. 7 Ch. 490; *Westlake*, *Internat. Law*, 158-9). Similarly, if a creditor have obtained a preference, by diligence or otherwise, over the foreign assets which the law of Scotland does not entitle him to, he cannot claim in the sequestration except on the footing of surrendering the benefit so acquired for equal distribution among all the creditors (*ib.*). If subject to the jurisdiction of the Courts of this country (as, *e.g.*, by lodging a claim, *ex reconventionem*), he may be sued by the trustee to yield up what he has obtained abroad (*Bell, Com. ii. 574*; *Bennet, ib. cit.*; *Barr*, 1879, 7 R. 247). This subject was formerly matter of express enactment (54 Geo. III. c. 137, s. 51; *Bell, Com. ii. 573-4*), and although there is no existing statutory provision, the rule is admitted, on the general principles of bankruptcy law.—[Goudy on *Bankruptcy*, 279, 636.]

**Equitable Compensation.**—See ELECTION.

## Equity.

### DIFFERENT MEANINGS OF EQUITY AS A LEGAL TERM.

Equity, as a legal term, has three meanings that require to be distinguished. It means (1) the principle, spirit, or reason which underlies the whole law, its general rules or particular decisions. Thus we speak of law as declaratory of equity, the equity of a statute or the equity of the case. So Blackstone says: "Equity is the soul and spirit of all law: positive law is construed by it, and rational law is made by it. In this sense, equity is synonymous with justice." It means (2) that part of the law or jurisprudence of a State which supplies the omissions or corrects the excesses of pre-existing law, whether in the form of codes, statutes, customs, the writing of jurists recognised as authorities, or the decisions of judges, for all these may and have erred. In this sense, we speak of the equity introduced by the *Jus Honorarium* or Prætorian Law of Rome, as distinguished from the *Jus Civile*, and of the equity of the Court of Chancery as distinguished from the common law of England. These two meanings are contradictory, for in the former law is equity, and in the latter equity is opposed to law, as where Cicero says of Galba, that he was wont "*Multa pro equitate contra jus dicere*," *De Oratore*, i. 57. It means (3) that part of the law or the decision of a case which is left to the discretion of judges



or arbiters, either by express provision of the law or without such provision.

The points so left to discretion may be questions of fact only, in which case the judges or arbiters act as a jury, but often also mixed questions of law and fact, or even when a reference is made to a lawyer, questions of pure law or legal procedure. In this sense we speak of the *arbitrium boni viri* and the *equitable discretion of a judge or arbiter*.

In the first and third of these senses no system of jurisprudence which aims at justice can ignore equity, for in the first equity means reason, and in the third it means discretion, two of the essential qualities of the judicial mind and of just judgments. In the second sense, in which equity constitutes a distinct province or branch of the law, there may not be in some States, or at some times, so distinct a separation of law and equity as existed in Rome during the period of the Pretorian Office and the epoch of the Classical Jurists, and which left its mark in the Digest even after Justinian, completing the work of earlier emperors, had fused law and equity, or in England during the period when the Chancellor and his Court exercised a separate jurisdiction. Austin, following other writers, as Meyer in his *Esprit des Institutions Judiciaire, La Haye*, 1819, contends that in this sense equity was confined to Rome and England. But it will be found that even in countries where no such separate system of equity or of equitable jurisdiction has ever existed, as on the Continent and in Scotland, which in this matter has followed France and not England, a similar, though in some directions less extensive, equitable power has been exercised in Courts which administer both law and equity.

No better general definition of equity has been given than that of Aristotle in his *Ethics*, v. 10, which Grotius adopted, *De Equitate*, i. s. 2: "The rectification of legal justice when it falls short on account of its generality" (*επανορθωμα νομιμου δικαιου ἢ ἐλλείπει δια το καθολου*); and no fuller description than in his *Rhetoric*, i. xiii.: "It is equity to pardon human failings, and to look to the lawgiver and not to the law; to the spirit and not to the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run, and not to the present moment . . . lastly, to prefer arbitration to judgment, for the arbitrator sees what is equitable but the judge only the law, and for this an arbitrator was first appointed in order that equity might flourish." Aristotle regarded equity (*επιεικεια*) from the side of morals, and includes in his description things which a lawyer or jurist would not include. Equity, however, is an ethical idea, and implies the correction of law, not only where it has erred by the ignorance or inadvertence of the lawmaker, or through alteration of circumstances, but also where it has become antiquated and repugnant to the conscience of a later age. How far in this last case the correction can be effectually made by a magistrate such as the Prætor, or by a judge such as the Chancellor, or whether it can only be made by legislation of the supreme power, is a question which has been answered differently in different countries, and in the same country at different times, or even at the same time, with reference to different cases.

Equity in the first sense, meaning (1) the principle or reason of the law, is theoretical, and concerns more the science of jurisprudence than the practice of the law, though it is sometimes appealed to in practice, as in the instances referred to, of an appeal to the equity of a statute or a law case. The English terms *Equity of Redemption* in mortgages, and *Equity to a Settlement* in favour of a married woman, are instances, however, in which

equity in this sense has been applied to a special doctrine of the law introduced by the Chancery Courts.

The other two senses, in which equity means (2) the correction of the law according to a moral standard, and (3) the discretion of a Court judge or arbiter, are of practical importance in every Court, and one or two general remarks may be made on them before treating, as is proposed, briefly—

I. Roman Equity, II. English Equity, and, somewhat more fully, III. Equity in the Law of Scotland.

Roman equity and English equity are subjects much too large for the present article, and may appear beyond its scope, but some account of them is necessary because the equity administered by the Courts in Scotland has been materially affected both by the Roman and English systems. The imperfection of the law renders necessary the equity which is required to correct its omissions, errors, or excesses. If the law were perfect there would be no need of equity, and so it has been said there is no equity in relation to God because the divine law is perfect. Human law is always imperfect, and a certain amount of equity will always be necessary both for its interpretation and application if the *summum jus* is not to become *summa injuria*. To what extent equity will be allowed to operate depends on the customs of different countries and the practice of different Courts. When no allowance is made for equitable considerations, Courts of justice become Courts of injustice. On the other hand, if equity is allowed too wide an operation, according to the view of individual judges without reference to any rules or precedents, it is apt to become arbitrary, uncertain, and as inequitable as the defective law itself. When discretion becomes caprice, it is not equity. It is in this view of it that Bacon said: "The best law is that which leaves least to the discretion of the judge, and the best judge is he who leaves least to his own discretion"; and that Selden made his jest, that the measure of law had become the measure of the Chancellor's foot. But the best equity will endeavour to avoid both extremes—on the one hand, the rigid application of the law so as to do injustice; and on the other, acting only upon the individual opinion, which is apt to become the caprice, of the judge.

The equity which remits to the discretion of the judge or arbiter particular circumstances and special cases, or, as often happens, parts of cases, is a kind of equity which cannot be dispensed with in the determination of many disputes arising in the practical conduct of business. All arbitration proceedings are examples of the use of this kind of equity. The arbiter is bound to use his discretion, and to decide according to what he considers fair, untrammelled by rules of law. If he does not go beyond the matter submitted to him, and does not violate essential justice in his procedure, *e.g.* by hearing one party and not the other, his judgment is not challengeable in any Court.

The preamble of a decree-arbital in the Scottish form, by which the arbiter states that he has "God and a good conscience before his eyes" in giving his decision, is an appeal to equity and its ultimate sources.

#### I. ROMAN EQUITY.

The word equity in Latin, *æquitas*, is derived by modern philologists not from the Greek *εἰσος* meaning reasonable, as it was by Grotius (*De Æquitate*, p. 2) and others, but from a Sanscrit root *aiko* or *eka*, meaning one (Fick, *Vergleichendes Wörterbuch*), or another root, *ak*, meaning to resemble (Corssen, *Aussprache*, p. 374; *Nachträge*, p.

237). Its ultimate derivation, though it might throw light on the original use of the word, is too remote to be of importance in ascertaining the metaphorical or secondary meaning or meanings which became associated with it when used as a legal term. But it seems improbable that Austin was right in regarding this original legal sense of equity as "universal or general, as opposed to particular or partial law" (*Lectures*, ii. p. 272); or Sir H. Maine as the levelling of the National Roman Law (*Jus Civile*) to make it agree with the Common Law of Nations; or Bracton and others, who identify it with *aqualitas*, in the sense of giving like decisions in like cases, although all these shades of meaning have become associated with it. The last, *aqualitas est aequalitas*, has been treated as one of the maxims of English equity, but is too vague to be of practical use.

The ordinary use of the word by classical authors, as Cicero and Plautus, and by the jurists of the classical period, whose dicta are embodied in the Digest both in the adjective "*aquus*" and the noun "*aquilas*," implies what is fair and reasonable. It was not used by the jurists as equivalent to the law introduced by the praetors' edict, although that law affords one of the best examples of the equitable modification of strict law. The word *aquilas* is indeed of somewhat rare use in the Digest, and, in one of the principal passages where it is used, is applied, not to the Praetorian Law, but to the *Jus Civile*, or to law (*jus*) in general. "*In omnibus quidem maxime tamen in jure aquilas spectanda sit*" (*D.* 50. 17. 90). So law is defined as "*Ars boni et aequi*" by Celsus (*Inst.* i. 1. 1), and the phrase, "*Secundum bonum et aequum*," like the phrase, "*Arbitrium boni viri*," which are both of frequent occurrence, has no special reference to the praetor or his edict. It is not, of course, disputable that the edict was, for a considerable period, the principal source of Roman equity, but equity was not supposed to be confined to it, and was deemed a principle which ought to permeate the whole law.

The Roman jurists considered the Law of Nature (*Jus Naturale*) as distinct from the Praetorian Law. But it has been overlooked that they also recognised that the praetor might decide contrary to equity: *Quod semper bonum et aequum est jus dicitur, ut est jus naturale . . . Quod omnibus aut pluribus in quaque civitate utile est ut est jus civile, nec minus jus recte appellatur in civitate nostra jus honorarium. Praetor quoque jus reddere dicitur etiam cum inique decernit relatione scilicet facta non ad id quod ita praetor fecit sed ad illud quod Praetorem facere convenit*" (Paulus in *D.* 1. 1. 11.; cf. Bracton, l. 4. 3, who adds: *Quandoque pro eo tantum quod competit ex sententiâ*).

The famous definition of the *Jus Honorarium* or Praetorian Law by Papinian, clearly indicates that the praetors in their edicts did not appeal directly, either to the Law of Nature or the Law of Nations, or to Equity, as the jurists frequently did, but to public convenience or utility. "*Jus Praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia, propter utilitatem publicam.*" This no doubt refers to the object of their reforms; but if the object was utility, practice was as likely to suggest the method in many cases as either the *Jus Gentium* or *Jus Naturale*.

The question of the relation between *Jus Naturale*, *Jus Gentium*, and *Jus Praetorium* is one of the most controverted in the history of Roman law, and here only what appears the most probable solution is stated without entering into proof.

All three modified or developed the older, stricter, and more literal *Jus Civile* by principles of reason or equity. But the *Jus Gentium* and *Jus*



*Naturale* were theories appealed to and used by the jurists in their responses and the text-writers in their treatises, while the *Jus Prætorium* was introduced by the experience gained in the execution of the prætor's judicial office. The *Jus Gentium* corresponded to what we now call comparative jurisprudence, which, by a comparison of the law of different nations, arrives at what is essential, as distinct from the local and temporary elements in legal institutions; but it originated in Rome from the number of persons, foreigners, or not full citizens, whose rights *inter se*, or in relation to Romans, had to be adjudicated. Comparative jurisprudence is also more theoretical. The *Jus Naturale* answered to what is now commonly called jurisprudence, or the philosophy of law, and was admittedly drawn by the Roman jurists mainly, though not exclusively, from the philosophy of the Stoics. The *Jus Prætorium* resembled the modification of the law introduced by English Chancellors, who at first, chiefly by new writs or forms of procedure, and afterwards by new rules, enunciated in the decisions of particular cases, remedied what was felt in practice to be the grave inconvenience, and sometimes the serious injustice, of the rigid forms and rules of the common law.

#### THE EQUITY INTRODUCED BY THE PRÆTOR.

The mode in which the edict of the prætor, and, to a small extent, of the curule ædiles, introduced equity deserves notice. It was almost entirely through procedure rules, published at the commencement of his year of office in the *Album* on the walls of his court in the Forum, which recognised the validity on the ground of equity or of convenience, new forms of actions, new remedies, new defences, and new forms of judgment and execution. Yet the prætor was called *Viva Vox Juris Civilis*, just as English judges who, however much they alter, are always deemed to declare the law. The power of the prætor to declare the law by edict was so closely contemporaneous with the system of the *formulae* which superseded the more strict *legis actiones*, that it may be deemed certain the two were closely connected. It was by the freer style of the *formula*, or issue for the trial of the case, which might be adapted to almost any set of facts, that many of the reforms of the prætor were effected. Only fragments of the edict have been preserved, but these have been very ingeniously reconstructed by various modern civilians, so that we have at least a skeleton of the perpetual edict, the greater part of which was embodied in Justinian's Digest. It consisted of four parts—

I. The procedure prior to the issue of the *formula* by which the defender was brought into Court, and preliminary proceedings of action determined. This was called the procedure *in jure*, which took place in the prætor's Court—*De Vocando in jus*.

II. The various actions and their corresponding *formulae* which the prætor sanctioned for trial before the *judex*—*De Judiciis*.

III. The various forms of decrees and their effects—*De re Judicata*.

IV. What was called *De Auctoritatibus Prætoris*, the forms of process introduced by the prætor for the procedure in his own Court, and which constituted perhaps the most important part of the edict, being subdivided into—

(a) *De Interdictis*.

(b) *Exceptiones* (Defences).

(c) *Stipulationes Prætoriae*, the rules as to consignation, caution, or surety, which, in certain circumstances, the prætor required at the commencement or in the course of a suit.



An example may be taken from each of these divisions, which included subjects which might not be at first expected. The first division included the title of "*In Integrum Restitutio*," by which the prætor restored a right that had been lost or destroyed in law but not in equity. He did so if the loss had been due to fear, fraud, innocent mistake (*justus error*), a change of status, necessary absence, or the infirmity of age. These were all cases for which the *Jus Civile* had no remedy, or no adequate remedy, as the damages it allowed did not restore the person injured to the same position he held before the injury. The bare statement of these names shows how much they depended on considerations of equity in the sense of fairness. The ground of "change of status" referred to specially Roman conditions, but all the other grounds are grounds of equitable relief recognised in English and Scottish practice.

The second division included the whole system of *formulae*, and covers therefore nearly every branch of law. One of the most important sections was that which dealt with the various cases in which the prætor, although he could not give the full right of property, gave *bonorum possessio* to the class of persons he deemed entitled to it in equity, although not in strict law. It might be given even against the express provision of a testament. As this possession was afterwards protected by prætorian interdicts, and became full ownership after a short prescription of one or two years, the person he preferred had practically nearly all the advantages of a full owner. The *bonorum possessor* corresponded to the equitable owner, as distinguished from the legal owner, in English jurisprudence; and to the beneficiary, or person with the beneficial interest, as distinguished from the fiduciary or trustee, in Scottish law.

Under the third division, *De re judicata*, the prætor introduced such important pieces of procedure, still known in Scotch practice, as the *Actio Judicati*, or action upon a decree, which he enforced by doubling the sum due if denied; and the elements of the procedure which was converted by the *Lex Julia* in the reign of Augustus into the *Cessio Bonorum*, or voluntary and mitigated bankruptcy.

Under the fourth division the Interdict system is the best example by which, like the injunction of the English Chancery procedure, the Court intervened to prevent the completion of an injury when the civil law action had only been able to try the case after the injury was done, and therefore could give only the imperfect remedy of damages. The prætorian *formulae* also concluded for damages, but only alternatively, in the event of the property not being restored or the contract not fulfilled.

In all branches of the edict it thus appears that the prætor, either by himself or by the directions he gave to the judge or judges to whom he remitted the case for trial, intervened to supplement the existing legal remedies by others which were introduced upon grounds of equity. Sparing in the use of the word, he was active in producing the thing, and introducing it into practice. To him was due the recognition of natural as against agnatic relationship as a test of heirship; the transfer of all property by delivery without formalities; the protection of equitable ownership; the defeat of manifold forms of fraud: the requirement of *bona fides* and the highest equity in contracts (*D. xvi. 3. 31*); the recognition in some cases and to some effects of natural, as distinguished from legal, obligations; and many other equities, most of which have now become part of the common law throughout Europe, and have nowhere been more completely adopted than in Scotland, which, having little or no common

law of its own, readily followed the rules its early clerical lawyers derived from the civil as well as the canon law.

The resemblance of many parts of the edict to what came in England to be called equity caused the praetorian law of Rome to be deemed the chief source of Roman equity, but it must not be overlooked that the jurists were also active in the equitable development of the civil law. The three sources of equity in Roman law may perhaps be called the historical (*Jus Gentium*), the philosophical (*Jus Naturale*), and the practical (*Jus Prætorium*). The question of priority has difficulties of its own, into which it is not necessary to enter: but it appears probable that while they overlapped each other, the first modifying influence was the *Jus Gentium*, the second the *Prætorian Edict*, and the third the writings of the jurists, who appealed both to the *Jus Gentium* and the *Jus Naturale*, and commented on the praetorian edict. The edict of the prætor had the advantage that it embodied equity in a more distinct, because concrete, form, and was free from the controversies of the jurists which culminated in two sects or schools, the strict and orthodox Sabinians and the free, rationalising Proculians; but there is an unsettled controversy as to what was the precise tendency of the rival schools. He was also (and herein he differed from the English Chancellor) an official who had a distinct function to declare law *à priori* by his edict, and was thus able to introduce equity more directly than the later Chancellors, who modified the law only by their decisions. The earlier Chancellors, who built the foundation of the system of Chancery procedure by bills, discoveries, subpoenas, etc., more nearly resembled the prætors. It was singular that an officer who held office only for a year, as the prætor did, should have such power, but a strong sense of continuity marked the Roman character and institutions. This led succeeding prætors to adopt the edicts of their predecessors, while adding their own improvements of the law, and made the edict in a measure what has often been desired by law reformers in this country, an annual revision of the law by the highest authority, until, in the reign of Hadrian and prætorship of Salvius Julianus it became the *Edictum perpetuum*, unalterable by succeeding prætors.

#### THE EQUITY INTRODUCED BY THE EMPERORS.

The imperial authority soon grew too great for the prætor to develop the law by equity at his own hand. That work had now to be continued by the responses of certain patented jurists (*Responsa prudentium ex auctoritate principis*), by commentaries of legal writers on the edict and other parts of the law, and by imperial legislation. But the freedom of the jurists was equally inconsistent with the absolutism of the later emperors. Two of the last and greatest jurists were executed—Papinian by Caracalla, Ulpian by the Prætorian Guards of Alexander Severus. The edicts and rescripts of the emperor ultimately superseded the jurists, as they had done the prætors. It came to be the explicit rule in the reign of Constantine: "*Inter æquitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere*" (C. 1 14. 1, and 1. 12. 3).

Whatever disadvantages this had from the constitutional side, it had the advantage that the emperor could introduce equity from the larger experience of the whole empire, and, after the conversion of Constantine, from the higher ethical standard of Christianity. It also became the law of the whole empire in a way the edicts of a subordinate official could not have done. The Code and Novells were the commencement or starting-point not merely of the civil but of the canon law of the Middle Ages: and the papal canon law during its earliest and best period continued the equitable develop-

ment which had been begun by prætors, jurists, and emperors. The codification of Justinian was itself an application of equitable principles extracted from the whole previous history of Roman law by a later school of jurists, Tribonian and the other imperial lawyers of Constantinople, in order to modify strict law. If it had been intended that the law of the emperor was to be absolute, the Digest would not have been compiled. There would have been, instead, one authorised Code applicable to the whole empire, similar to, but more universal than, the Codes of modern times.

From this rapid survey, it appears that equity was not an occasional or accidental force modifying Roman law, but one constantly operating, though by different methods and with different degrees of effect, during the whole period of the growth of the Roman jurisprudence. It did not finish with the Roman Empire. Its results were handed down, in the Roman and the Barbarian Codes, to the new age. It continued to operate not only on the canon law but on the civil law of the different States which arose after the Roman Empire was dissolved. It would be interesting, but is here impossible, to trace its future history during the Middle Ages (*first*) through the canon law, which in some branches, *e.g.* the law of the family relations, became a more direct source of modern equity than the Roman law; (*second*) through the renewal of the study of the Roman law by the Italian glossatores, whose maxim, "Quiquid non agnoscit glossa non agnoscit curia," shows their influence on the mediæval Courts, and whose tendency was to modify the Roman law, so as to adapt it to the altered relations of mediæval Europe; (*third*) by their successors, the jurists of France in the 16th and 17th, of the Low Countries in the 17th and 18th, and of Germany in the 18th and 19th, centuries, whose discussions and commentaries had always relation to the equitable ideas of their times.

The effect of this continuous flow of juristic glosses and commentaries on the pre-existing system, which, however changed, still retained the name of Roman law, from the era of Gaius to that of Papinian, from that of Papinian to that of Justinian, from that of Justinian to that of Imerius the Glossator, from that of Imerius to that of Cujacius, from that of Cujacius to that of Voet in Holland, Pothier in France, and Savigny in Germany, to name only the greatest of the multitude of lawyers who devoted their lives to the study and teaching of the civil law of Rome, has been to show how its equitable principles may be used to purify and mould the form and substance both of mediæval and modern law, and the education of lawyers in all times and countries. It is also a warning that the best equity is not always the most recent. A very large part of Roman equity, and still more of Roman law, is now obsolete, and retains only antiquarian, or historical, interest, because it is unsuited to the circumstances of modern life and business. But there remains a portion which, either by its clear enunciation of principles of justice or by its skilful adaptation to the legal relations which exist in all civilised countries, and their consequences, suffices to correct some abuses and errors both of mediæval and modern law, and must even now be deemed one of the best guides to equity.

## II. EQUITY IN ENGLISH LAW. ITS HISTORY.

In England neither the Roman civil nor the Roman canon law were openly accepted in any of the Courts, except the Admiralty and Ecclesiastical Courts. The question whether any survivals of Roman law from the time of the Roman occupation remained in local customs does not concern the present subject. It is certain that much Roman law, directly or indirectly, through the canon, passed into the English law in the writings of lawyers and



the decisions of judges more or less acquainted with it, but who did not acknowledge until recently their obligations. This began as early as the age of Glauville, and has continued down to the present day. But the main course of English law and legal procedure was independent of Roman influence, and was the result chiefly of historical causes within England itself. These causes led to a separation of equity from law, and of the Courts of Equity from the Courts of Law, as distinct and more complete and lasting than the Roman similar separation, for it continued to be administered not only under the authority of a separate official, the Chancellor, but in a distinct court, the Court of Chancery, which investigated facts in a different way by its own officials, and not by jury, and determined cases on equitable principles and considerations, and not by the strict rules of law. The origin of English equity, its development, and even its present position after its fusion with law, are so nearly parallel to similar stages in the history of Roman law that it has been thought by some that the English Chancellors borrowed more than they in fact did from that law; by others, that the development was the result of a strong resemblance between the Roman and English character; and by others, that the progress from a system of rigid forms suitable to an early state of society, but gradually modified and corrected by successive drafts of equity as society advances, is in some shape a necessary process in the history of law in all countries. The truth seems to be, that all these circumstances combined to the formation of the English equity system, which rivalled in its importance the older common law. A very brief sketch of the elaborate system of English equity can only be given here.

While Saxon customs and institutions continued in the English local courts, the Norman law, after the Conquest, regulated not only feudal relations, and the land and succession to it, as bound up with these relations, but also the procedure in all cases which came before the Supreme Royal Courts of Common Law—the King's Bench, Exchequer, and Common Pleas. These Courts, though originally parts of the Curia Regis, became separate Courts. The reforms of the Plantagenet kings led to this separation, as they did to the larger constitutional separation between the executive, administrative, and judicial functions of the Curia Regis, and became still more marked after a representative Parliament was introduced. In the reign of John, by the 4th Article of Magna Charta, which ordained that "*Communia placita non sequuntur curiam regis sed teneantur in aliquo certo loco*," the Court of Common Pleas was settled at Westminster, though the Courts of Exchequer and King's Bench continued to follow the king for some time. This arrangement was found so convenient that, after the reign of Edward I., the Courts of King's Bench and Exchequer also held their principal sittings at Westminster. Although a provision was made in the *Articuli super Cartas*, 28 Edw. I. c. 5, that the justices of the King's Bench, as well as the Chancellor, should follow the person of the king, this does not seem to have been long observed. The practice of sending judges on circuit, however, continued, and still exists, for the trial of civil as well as of criminal cases; and the ordinary mode of trial, both at Westminster and on circuit, was by jury as to the disputed facts, and by the judge as to law, both of which were reduced, by a technical but highly skillful method of pleading, to simple, and if possible, single issues. This system, while admirably contrived for ordinary cases, was tied down at the commencement of its proceedings to certain specific and technical forms of writs of action, during its course to the technical pleading called special pleading, and at its conclusion to certain specific and technical forms of



writs of execution. It did not allow the trial of new kinds of cases, although an attempt to deal with varied circumstances was made by the introduction of the action on the case in the 13th of Edward II., which answered to the *actio utilis* of the Roman law. For extraordinary cases, and cases which were not recognised by the common-law judges, an appeal had to be made to the King and his Council. It was a natural course to refer such cases to the Chancellor, as one of the greatest officers of State and usually a clerical lawyer, and that officer retained such cases within his own cognisance partly because the common-law judges would not undertake to deal with writs couched in new forms with which they were not familiar, but chiefly, as time went on, because he deemed his own courts, officials, and methods of inquiry better qualified for such suits.

Edward I. commenced the practice of sending petitions, addressed to him for extraordinary remedies, to the Chancellor and Master of the Rolls, or one of them, to decide according to "honesty" or "conscience," expressions equivalent to equity in the sense of fairness. Somewhat later, in the reigns of Henry V. and Edward IV., the word "equity" was itself used. The use of the term "conscience" was due to the fact that the Chancellor, with rare exceptions, was an ecclesiastic trained in the practice of canon law, and accustomed to preside over the *Forum Conscientiæ*. The explanation that he was keeper of the king's conscience, and bound, therefore, to see that nothing contrary to conscience was allowed, is a later and artificial theory. Several points of Chancery procedure can be directly traced to the ecclesiastical profession of its chief judge—as, the importance attached to an oath taken on commission or affidavit, the writs of subpœna, and the mode of compelling discovery of documents in the hands of an opponent by one form of that writ. It is from the reign of Edward III. that the wide jurisdiction of the Court of Chancery dates. In that reign it is first called by Fleta the King's Court, *curia sua*. It included both an ordinary, sometimes called a common-law side, and an extraordinary or equity side. In the former, the Chancellor decided petitions of right, rescission of letters-patent, executions upon recognisances, and a few other special matters. In the latter, it decided all petitions of grace referred to the Chancellor by the King. The number of these steadily increased as the business of the realm grew too large for the Council, and the Chancellor and Master of the Rolls, with a growing number of subordinates, Vice-Chancellors and Masters in Chancery, showed a superior capacity in dealing with cases of this kind. On the other hand, the Common Law Courts, with the exception of the Exchequer, which silently assumed extraordinary jurisdiction of an equitable kind, but of no great extent (transferred to the Court of Chancery by 5 Vict. c. 5), continued to decline to entertain cases of an equitable character, which often required the decision of complicated disputes involving a number of parties, and incapable of being reduced to simple issues.

The history of the English law must be referred to as to the conflicts of the Court of Chancery with the Common Law Court, the House of Commons, and the House of Lords, in which it was generally successful, but failed (as the Court of Session in Scotland did) in stopping appeals from its decisions to the House of Lords. Its cogent powers and ever-increasing jurisdiction was largely due to its president being the Lord Chancellor, whose authority was far greater than any of the Common Law Courts, but also to the adaptations and alterations made through the equity doctrines introduced by a succession of great Chancellors, of whom the chief were Bacon, Ellesmere, Nottingham, Hardwicke, and Eklon. During the

Chancery of Eldon it became generally recognised that the time for introducing new equitable doctrines by the will of a single judge, even of a Chancellor, had ceased. While C. J. Vaughan, in the reign of Charles II., said, "I wonder to hear of citing precedents in matter of 'equity,'" Eldon declared that prior decisions in equity were as binding as those in common law, and, their number having become so large, there was little room for new equity. While he altered the law in many Scottish appeals, he rarely overruled precedents of the English Chancery Court judges, who developed equity according to their own view of the ethical standard as applied to legal affairs. About the same time the Court of Chancery, notwithstanding its high pretensions as a Court of Conscience or Equity, had acquired a character of accumulating the common judicial abuses, but to a greater extent than had been before known. Its procedure became dilatory, its pleadings verbose, its decisions fluctuating, its costs enormous, and its retention of suitors' funds in its own hands discreditable. These abuses were gradually removed or lessened by legislation, or the action of the Chancery judges themselves. But the fundamental inconvenience caused by the separation of the Courts of Law from the Courts of Equity, which led to circuity of process and unnecessary conflicts of decisions in the same case, continued. It was at length felt that the time had come for the union or fusion of the two jurisdictions of law and equity, and this was effected, or at least attempted, in a considerable degree with success, by the Judicature Act of 1873. This Statute has sometimes been represented as a triumph of the Chancery procedure, but it must be borne in mind that common-law judges never admitted that the common law did not give weight to equity, and that many common-law principles, and much common-law practice, was retained under the Act. Its real character may more truly be represented as an attempted amalgamation of what was deemed best in both jurisdictions.

#### EXTENT OF CHANCERY JURISDICTION PRIOR TO THE JUDICATURE ACT.

The extent of the equity jurisdiction of the Court of Chancery, as it stood prior to 1873, is summed up in sec. 34 of the Judicature Act of that year, which, while it fused law and equity, in so far as it declared that they were to be concurrently administered, and that all equitable rights, titles, grounds of relief, or defences were to be given effect to in any action, by any judges, or judges of the High Court of Justice, yet assigned to the Chancery Division of the High Court the jurisdiction in such matters as had been formerly under the exclusive jurisdiction of the Court of Chancery. These were—

1. The administration of the estates of deceased persons.
2. The dissolution of partnerships; taking partnership accounts.
3. The redemption and foreclosure of mortgages.
4. The raising of portions or charges on land.
5. The sale and distribution of proceeds of property subject to any lien or charge.
6. The execution of trusts, charitable and private.
7. The rectification and cancellation of deeds and written instruments.
8. Specific performance of contracts.
9. Partition and sale of real estates.
10. Wardship of infants and care of their estates.

The effect of these provisions practically is, according to writers on English equity, that the exclusive jurisdiction of the Court of Chancery is retained in the Chancery Division, that the concurrent jurisdiction of the

Court of Chancery still continues in the Chancery Division, and that only the auxiliary jurisdiction which the Court of Chancery exercised in aid of the common-law suitor, to give him, on grounds of equity, full relief, being no longer necessary (for the Common-Law Divisions themselves exercise the jurisdiction), is abolished. As a distinct class of lawyers practise in the Chancery Division, and the judges in that Division are usually chosen from that class, and its decisions are separately reported, the fusion of law and equity in England is still incomplete, and possibly less complete than some of the authors of the Judicature Acts intended. Still, common-law barristers are sometimes appointed to the Chancery Division, or as Lords Justices in the Court of Appeal, from that class, and lawyers of both the common-law and Chancery bars, and of the Scottish and Irish bars, sit in the House of Lords, and this interchange of judges must tell in favour of more complete fusion of law and equity. Circuity of action and double procedure have been effectually put down, but the existence of equity and equitable rights, as distinct from law and legal rights, is still acknowledged, and principles or rules of equity are still frequently appealed to. The provision of the Judicature Act is that "in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail." Unless such rules are interpreted to mean rules existing before 1873, equity is still, in England, a progressive force, which may modify, correct, and enlarge the strict law where the judges of the High Court of Justice or the House of Lords deem this necessary or expedient. The English editor of Story's *Equity Jurisprudence*, ed. 1892, p. viii, says: "It is therefore to the Chancery Division that in the future we must look for the development of our case law, so as to meet the exigencies of a state of society becoming yearly more and more complex"; and he "even asserts that what was termed equity jurisprudence now comprises the whole of the law of England with the exception of commercial law (which itself seems now to have done its work), the law of wrongs, and administrative law." But these are the one-sided views of an old Chancery practitioner, which, it may be hoped, the judges of the other Division of the High Court will falsify by taking part in the progress of equity. Lord Davey recently claimed for Lord Bowen, a lawyer trained in the common law, that his object was to make the law represent the conscience of the nation. This is substantially the same thing as to say that the law should advance with the advance of the ethical standard.

#### MAXIMS OF ENGLISH EQUITY COURTS.

In conclusion, it may be worth while to give the maxims which all text-writers upon English Chancery practice state as the fundamental rules on which English equity was administered and enlarged in the old practice of the Chancery Courts, and which continue, they say, to be given effect to in the united High Court of Judicature—

1. Equity will not, for a merely technical defect, suffer a wrong to be without a remedy.
2. Equity follows the law.
3. When there are equal equities, the first in time prevails.
4. When there are equal equities, the law prevails.
5. He who seeks equity must do equity.
6. He who comes into equity (*i.e.* a Court of Equity) must come with clean hands.
7. Delay defeats equities.



8. Equality is equity.
9. Equity looks to the interest rather than the form.
10. Equity looks on that as done which ought to have been done.
11. Equity imputes an intention to fulfil an obligation.
12. Equity acts *in personam*.

(Snell, *Principles of Equity*, 11th ed., p. 14.)

These are a curious mixture of old rules of law, derived from the Roman law and principles of ethics, transferred or applied to law and rules of procedure in Chancery. They are useful enough as a *memoria technica*, and as a key to many of the decisions in the Chancery Courts; but the key itself requires many directions how to use it, as may be seen in the elaborate treatises on the subject of English and American equity. They make no pretence to be either a logical or philosophical arrangement of equity, even of equity as administered by the Chancery Court. Some of them were used by Chancery judges for the purpose of enlarging Chancery jurisdiction. So the first maxim, which is also a common-law maxim, "There is no wrong without a remedy," was used to overrule the Common-Law Court when they gave effect to what the Chancery judges held to be merely technical defects. The last maxim, "Equity acts on the person," was employed to give the Court of Chancery jurisdiction over land and other property in other countries, provided it could effect service on the person of the legal owner, or, it might be, in the case of trustees of only one of its legal co-owners, as in the recent *Orr Ewing* case. The third, seventh, and eighth maxims were well known to the civilians in the forms: "Prior tempore potior Jure; Vigilantibus non dormientibus jura subveniunt; Æqualitas est æquitas." The others are, generally speaking, moral precepts; thus "Who seeks equity must do equity," and "He who comes into equity must come with clean hands," are only legal expressions of "Do as you would be done by." The ninth, "To regard the intention rather than the form," is the rule of all Courts which construe documents; but it must be kept in view that it is restricted by the rule of evidence, that when a matter has been reduced to writing the meaning must be found in the writing, and that extrinsic evidence is allowed only of the surrounding circumstances, or to explain patent ambiguities.

### III. EQUITY IN THE LAW OF SCOTLAND.

#### SCOTTISH EQUITY DATES FROM INSTITUTION OF COURT OF SESSION.

Prior to the institution of the Court of Session, in 1532, there can scarcely be said to have been any general or definite body of Scottish law, apart from a small number of Statutes. There were so few general customs that it was even a question whether the expression common law meant the Roman law or the Scottish customary law. Consequently there could be no distinction between law and equity. Stair assumes that "the law of Scotland at first could be no other than 'æquum et bonum,' equity and expediency," but he means probably that there was no statute law. There were in fact, from the earliest period we know anything certain of Scottish law, many Courts administering different kinds of law which could not be called equity—the Curia Regis for Crown vassals; the Court of the Justiciar for crime; of the Chamberlain for revenue and burghal administration; of the Sheriff, as representative of the king, in the counties; the Feudal Courts of Lords of Regality and Barons within their several jurisdictions; and the Ecclesiastical Courts of the Bishop's Officials. Each of these Courts was no doubt bound by certain authorities, and had



rules of procedure; but the judges acted largely according to their own discretion, which was too arbitrary to be called equitable; and there was no authoritative and easily accessible Court of Appeal. The difference and fluctuation in the practice of these various Courts, whose decisions were not reported, was one of the causes which made a Supreme Central Civil Court necessary. The new Court united the jurisdiction of the earlier itinerant Session of James II. and of the daily Council of James IV. with that of the Committee of Parliament called Lords Auditor and the Council of the King called the Lords of Council, so that the Lords of Council and Session, the title its judges assumed from the first, combined both a legal and an equitable jurisdiction. Half of its judges being ecclesiastical lawyers, it necessarily also derived much of its law from the canon, and, either directly from Justinian's *Corpus Juris*, or through the canon, from the civil law of Rome. It was from its foundation a Court of Equity as well as of Law.

#### STAIR AND ERSKINE'S DOCTRINE OF EQUITY.

Stair, after referring to the English Court of Chancery as a distinct Court of Equity, explicitly states: "other nations do not divide the jurisdiction of these Courts, but supply the cases of equity and conscience by the noble office of the Supreme Ordinary Courts, as we do." This noble office, commonly called *Nobile officium*, in civil cases he regarded as peculiar to the Court of Session, and not possessed by Sheriff or other inferior Courts. He likens it to the power of the prætor, and gives, as examples of its use (Stair, iv. 3)—

1. Modifying exorbitant penalties in bonds and contracts.
2. Treating legal executions, when exorbitant, as redeemable securities within a time fixed, called the legal.
3. Reducing its own decrees when there is anything wanting in material justice, but not for mere informalities.
4. Allowing appraisings to creditors when the apparent heir of the debtor renounced the succession.
5. Supplying defective conveyances by adjudications in implement.
6. Examining witnesses *ex officio*, i.e. on the Court's own motion, in cases where writs are suspected as fraudulent, and, where the proof is pregnant, sustaining it though contrary to the writ: and by this "trusts are discovered." But the later Statute 1696, c. 5, restricted the proof of trust to writ.
7. Allowing proof before answer as to the relevancy.

By equity Stair understood both "the moderation of the extremity of written law and the whole law of the rational nature, for otherwise it could not possibly give remedies to the rigour and extremity of positive law in all cases." These are the two first senses of equity explained at the commencement of this article, the one correctory of the strict law and the other declaratory of the law of nature. Stair makes an advance upon the Roman term *jus naturale*, by calling it "the law of the rational nature." This was due to the clearer conception of this source of equity, to which Grotius and the jurists of the 17th century had attained. Nature was no longer mere animal nature, as with Ulpian, or human nature, as with Gaius and the other early Roman jurists: it was reason, the highest part of the nature of man. He takes the side of Grotius, who held that law was founded on principles; and observes, it was not merely a "congestion of the contents of the law." Equity or the law of nature, he says, "standeth wholly upon practical principles, which are created in and with the soul of man"; and "equity is the body of the law, and the statutes of men are but as the ornaments and vestiture thereof,

and in the explanation of every part of it will most fitly fall in accordingly. But the best demonstration of this will be ocular, by our delineation of equity and positive law together." The whole of Stair's *Institutions* is, in fact, an ocular demonstration of this text: for while his citation of decisions and exposition of statutes are as full as those of any lawyers of his time, he always seeks to discover the equitable principles on which they were grounded. "The principles of equity," he remarks, "are the efficient causes of rights and laws; the principles of positive law are the final causes or ends for which laws are made and rights constituted and ordered" (1. 1. 18). This view of Stair long continued to influence the development of the law of Scotland. It has been claimed for it that the decisions of the Scotch Courts were based more frequently than those of the English upon principles, and less upon mere precedents. But as the number of reported Scottish decisions increased, and the practice of founding upon the decisions of English Courts has become common since the Union, this is less the case than before that date, and a leading practitioner recently observed that Scottish lawyers were becoming more and more case-lawyers.

Erskine's doctrine of equity is a brief echo of that of Stair, but he adds a far-reaching remark, "that if the extraordinary provision of the *Nobile officium* were not now transferred to the Court of Session from the Privy Council, there would be a defect in that part of our Constitution, and many wrongs be without a remedy. For which reasons the author of *Historical Law Tracts* (Lord Kames) reasonably conjectures that it will be soon considered as part of the province of the Court of Session to redress all wrongs for which a peculiar remedy is not otherwise provided" (*Inst.* 1. 3. 23).

In fact, the flexible and adaptable general forms of action by declarator, reduction, petitory and possessory summonses, whose conclusions can be easily moulded to suit the circumstances of any case, and the use of interdicts borrowed from the civil law, enabled the Scottish Courts to provide a remedy for nearly every case, in a way which could not be done by the writs of the English Common-Law Courts, each of which was confined to a particular state of facts. The action on the case, introduced by 13 Edw. II., was an attempt to cure this, but fell short of a sufficient remedy, and led to the Chancellor providing remedies in his own Court.

#### WHY NO SEPARATE EQUITY COURT IN SCOTLAND.

The absence of a separate Court of equity in Scotland was not due to one, but to many, causes: (1) the adoption from the first of much of the equity of the Roman law, both civil and canon; (2) the acceptance of these laws as subsidiary to the native customs and Statutes; (3) the Chancellor himself being a member of the Court of Session when first instituted; (4) the education of the leading Scottish lawyers in the 16th and 17th and first half of the 18th centuries abroad at the Universities of France and the Low Countries, who brought back with them the developed equity taught by the professors of the civil law, and the works of the civilians; (5) the tendency of the Scottish intellect to study mental philosophy; finally, the circumstance that, when the Roman law began to be less quoted in the Court and chiefly cultivated for educational purposes, the English equity decisions began to be quoted. While there was no separate Court of equity in Scotland, the Court of Session always paid attention, though in different degrees at different times, to equitable considerations. Scotland thus gained the benefit of using a large body of equity decisions without the disadvantage of separate jurisdictions.

## KAMES, "PRINCIPLES OF EQUITY."

Almost the only treatise on equity in English, apart from works on the practice of the Court of Chancery, was written by the Scottish judge, Lord Kames. His *Principles of Equity* was published in 1766, dedicated to Lord Mansfield, and received the approbation of Lord Hardwicke, who judged it as an English equity lawyer, and the censure of Blackstone, who represented the view of the English common lawyers. Mansfield, a Scotchman by birth and well versed in the Roman civil law, had already introduced many principles of Roman equity into English mercantile law, and was followed by several leading common-law judges. But English equity had taken deep roots and acquired a wider jurisdiction in the Chancery Courts. The equity whose principles Kames sought to discover answered more nearly to the equity of the Chancery Courts, and several of the too loosely-expressed rules, stated at the close of his work, occur in the twelve maxims in which English Chancery practitioners summed up the grounds of the jurisdiction of their Courts, *e.g.*: "He that demands equity must give equity;" "For every wrong there ought to be a remedy"; "No one is permitted to take advantage of his own fraud."

The *Principles* of Kames failed in precision, and his book has never been deemed a great authority. Yet it went through three editions between 1760 and 1778, and was at one time frequently cited in the Scotch Courts. It had considerable influence with the judges of last century, and led them to allow a more frequent appeal to equity. In the interesting correspondence with Lord Hardwicke preserved in Lord Woodhouselee's *Life of Kames* the Scottish judge maintains, as might be expected, the superiority of the practice of Scotland, in administering law and equity in the same Court, to the English separation of the jurisdictions. The English Chancellor, although he concedes that this is better for individual suitors, contends, as Bacon did, that the development of equity is more rapid when it has a Court of its own. This is a long-standing and not yet settled controversy. Although the Scottish practice has, since the Judicature Act of 1873, been to a large extent adopted in England, it has yet to be seen whether the administration in England of both law and equity in one Court, and by the same judges, may not check equity. It has been sometimes thought that it has done so in Scotland. If it did so to a material extent, and left to legislation alone the task of correcting the errors of law, the result would be serious, for every lawyer knows how imperfect an instrument parliamentary legislation is. The number of amending Statutes is pregnant proof how often and how soon statute law requires to be itself corrected. Perhaps, however, it may be found that the office of judges, in introducing equitable modifications of the written and rigid law, does not cease when they have power to administer both in the same Court, and with reference to the same cases. Much will depend on the class of men appointed to the higher judicial offices. While they are bound by express statutory provisions and decided cases of authority, there still is a large region of law in which they can apply equitable principles.

## PRESENT POSITION OF EQUITY IN SCOTLAND.

The present position of equity in the Scottish Courts may be thus stated. The Court of Session, as the Supreme Civil Court, is still deemed in all branches of its jurisdiction, as it was at its commencement, a Court both of equity and law. It is quite competent to "a judge," said its late President, "to address to the jury principles of equity as well as rules of law" (*Forrest*



& *Bain*, 8 M. 195). Its forms of actions, especially declarator, reduction, suspension and interdict, are equitable forms which can be applied to almost any variety of facts (*Kames, Law Tracts*, 3rd ed., p. 228). Equitable defences can always be pleaded, and their scope has in many cases been extended. For example, compensation was introduced by the Act 1592, c. 143, but only where both debts were liquid. It has been extended to debts which, although not liquid, can be immediately liquidated by the equitable doctrine *liquidum est quod statim liquidari potest*; and in bankruptcy, by the equitable doctrine of balancing accounts to a debt due to a creditor who is also a debtor of the bankrupt, although his debt is illiquid (*Bell, Com.* ii. 118).

Again, since the repeal of the Usury Laws, it is not illegal to stipulate for any amount of interest; but the Court recently cut down, on grounds of equity, an usurious contract, in which bills for £250 had been taken without consideration, except a delay of twenty-four hours in enforcing payment of a debt with usurious interest (*Young*, 1896, 23 R. 419). In this case some of the judges observed that the usurious interest itself might have been cut down also, if the pursuer had not consented to pay it. Similar usurious contracts have been refused effect in more than one Sheriff Court. As absence of consideration is not a ground for setting aside a contract by the law of Scotland, the only ground on which these decisions can be based is that the Courts will not allow exorbitant interest, though what is exorbitant has yet to be determined.

The *Nobile Officium*, or extraordinary jurisdiction, of the Court of Session has been recognised, as we have seen, since its foundation (*Stair*, iv. 3. 1), although the extent to which it will be exercised has differed. The tendency in recent times has been, perhaps, to restrict it in general to cases where there is a direct or analogous precedent or manifest necessity for the intervention of the Court. This is, in fact, an equitable jurisdiction; and it will be found that most cases which fall under it have been, in England, held to belong to the Court of Chancery. It is expressly deduced by *Stair* from the Roman law and the office of the prætor (*Stair*, iv. 3. 1); and he remarks that every sovereign Court must have the power unless there be distinct Courts of equity, as in England. The procedure in the Bill Chamber by suspension and interdict, and especially by interim interdict, is another and an early example of Scottish equity. The existence of a separate Court or Chamber for such cases is an accident, and has led to inconvenient results, which are avoided in the Sheriff Court. The effect of the interim interdict is to supply a form of process which can be worked more summarily, and in vacation as well as session, to regulate the state of possession, on principles of convenience and equity, until the absolute right can be determined.

#### THE EQUITABLE JURISDICTION OF COURT OF SESSION UNDER NOBILE OFFICIUM.

The following are the chief categories of the equitable jurisdiction of the Court of Session now exercised in virtue of its *Nobile Officium*, besides those stated by *Stair*, with a few recent examples of its exercise under each:—

1. Petitions not founded on Statute, of which there are many kinds; as for the custody of children, the appointment of guardians, the removal of trustees, the appointment of judicial factors, the sequestration of estates pending litigation, and on other grounds (*Ewing*, 10 A. C. 453); for authority to change a name, to appoint public officers *ad interim*, to control the proceedings of public bodies when they act *ultra vires* (*Nicol*, 1870, 9 M. 306), or of arbiters on the same ground (*Watson*, 1895, 22 R. 362). An



unusual case shows the power of the Court to give new remedies when new cases occur—*Mitchell*, 1893, 20 R. 90, which was a petition to authorise a widow to remove her husband's body to another place of interment. In this case the Court remitted to the Sheriff, with powers which he would not himself have possessed; as it has done in other cases where the *Nobile Officium* was in question, but the decree could be most conveniently adjusted by the local Court.

2. The whole law of trusts is practically due to an equitable development of the principles of the contracts of mandate and deposit, and the Scottish Court has developed it and kept it in harmony with the English law by frequent references to English equity decisions. With regard to charitable trusts, the Court has power to declare their objects, and to settle or vary schemes for their execution (*Glasgow Royal Infirmary*, 1887, 14 R. 680, and 15 R. 264). This is similar to the jurisdiction of the Court of Chancery (Ld. Deas in *University of Aberdeen*, 7 R. 1094), but the Court of Session has not the visitatorial jurisdiction of the Court of Chancery (Maclaren, *Trusts*, p. 1449).

3. The Court has jurisdiction, but only in cases of practical necessity, to supply omissions in Statutes (*Von Rothberg*, 1876, 4 R. 263; *Myles*, 1893, 20 R. 818).

4. It has also, though rarely, supplied provisions for a *casus improvisus* in deeds. Its powers under this head have been enlarged, as regards granting powers to trustees, where not inconsistent with the terms and expedient for the execution of the trust (30 & 31 Vict. c. 97, s. 3).

5. It has a general power to review the proceedings of all inferior Courts, unless expressly excluded by Statute (*Higgins*, 1824, 3 S. 168). This, though perhaps not strictly an equitable jurisdiction, has the effect of introducing equitable considerations into all matters dealt with in the inferior Courts, and it did so especially during the period when there was doubt as to the equitable jurisdiction of the Sheriff Court.

6. It has an equitable jurisdiction in the cases stated in the passage already cited from Stair (Stair, iv. 3. 2): but this jurisdiction is not now, in several of these cases, exclusive, but may be exercised also by the Sheriff Court, e.g. the power to examine witnesses *ex officio*, or to allow proof before answer on the relevancy.

#### EQUITABLE JURISDICTION OF THE SHERIFF COURT.

It seems originally to have been held that the Sheriff had no jurisdiction in equity, but this rule was soon departed from, and equitable defences, e.g. homologation, *rei interventus*, retention, salvage, and others, are now, and have been for long, pleadable in the Sheriff Court. "If against a process founded on common law an equitable defence be stated, it is the practice of inferior Courts to judge of such defences" (Kames, *Principles of Equity*, i. 30). This may be on the view stated by Kames, that "what is a rule of equity, when fully established in practice, is considered common law" (Kames, *Principles*, i. p. 27). Kames, upon the same ground, allows the competency of the Sheriff Court in many actions founded originally on equity, "which have by long practice obtained an establishment so firm as to be reckoned branches of the common law. This is the case with the *actio negotiorum gestorum* and many others." Indeed, it is thought that the rule is now reversed, and that the Sheriff Court has a general equitable jurisdiction in all actions as well as defences, except (1) the class of cases which have been treated as peculiar to the *Nobile Officium* of the Court of Session, and (2) with regard to a few forms of action, such as declarator,

reduction, proving the tenor, and adjudication, for which it has no forms of process or means of carrying out the necessary decrees (Dove Wilson, *Sheriff Court Practice*, 4th ed., p. 46). In several of these excepted cases recent legislation has conferred a limited jurisdiction on the Sheriff Courts, as in *declarations*, where the value in dispute does not exceed £40 by the year, or £1000 (40 & 41 Vict. c. 50, s. 8). *Reductions* are still incompetent; but as objections may now be stated to any deed or writing by exception in the Sheriff Court, the effect of the rule is much limited (40 & 41 Vict. c. 50, s. 11). *Suspensions* are competent for charges for payment of any sum not exceeding £25 of principal (1 & 2 Vict. c. 119, s. 19). The above statutory provisions show, however, that equity was not deemed sufficient without legislation to give the Sheriff Courts jurisdiction in such cases. On the other hand, actions of interdict and for specific performance, two of the most important kinds of equitable remedies, appear to have been always, and are certainly now, competent to the Sheriff Court. It may also be remarked generally, that all actions or contracts, other than those which have penal conclusions or are of the nature of executions (diligences) rather than actions, are, by the law of Scotland, actions *bonæ fidei* in whatever Court they are brought. The *actiones stricti juris* of Roman law, in which, as in the old English common-law pleadings, a mere slip in pleading might cast the suit, are, with few if any exceptions, unknown. This is so to a greater extent than formerly since the more liberal powers of amendment introduced by the Court of Session Act, 1868, and the Sheriff Court Act, 1876.

The jurisdiction exercised by the Court of Session under the *Nobile Officium* is still beyond the power of the Sheriff Court, and forms now the most important exception to the wide extent of its equitable jurisdiction: but the Court of Session may remit cases which fall under it to the Sheriff, with instructions how to dispose of them.

#### EQUITY IN THE SENSE OF DISCRETION.

This form of equity necessarily belongs to every Court of justice and every judge, to a greater or less extent. It is sometimes expressly conferred by Statute, but exists without Statute in cases appropriate for its exercise, of which a good example is the power of awarding costs. Here the general rule is that costs follow the event, and the unsuccessful party must pay the judicial and reasonable expenses of his adversary: but it is recognised also that the Court has a discretionary power to award expenses to the unsuccessful party, and to modify or refuse expenses to the successful party. This may be done even in regard to jury trials (*Elliot*, 1896, 33 S. L. R. 495). These, of course, are exceptional cases, and the general rule is followed, unless in strong circumstances of misconduct, or of causing unnecessary expense, or of failure in a distinct part of the case. On the other hand, the exercise of discretion may be limited or cut off by Statute where an express rule is laid down, which the judge is bound to follow, or by precedent, where there is a binding decision that discretion is excluded in the same or closely similar case.

Another instance of discretionary equity is as to the measure of damages, which, though a proper question for a jury, is in Scottish practice often left to the decision of the Court, which then acts as if it were a jury, and takes an equitable or common-sense view of the whole circumstances of the case. There are, however, cases in which the measure of damages, or the mode of estimating damages, is fixed by long practice and decisions, from which a judge will not depart, *e.g.* in the estimation of loss by breach of a contract of sale. Discretion is more generally competent in

actions grounded on injury, where the amount of actual loss is more a question of average and of common sense than of precise calculation.

Many matters of procedure are also left to the discretion of the judge: and where this is so, it is a general rule that an Appeal Court will not overrule his discretion, although its opinion may differ from his.

#### *Authorities.*

*General.*—Aristotle, *Ethics*, v. c. 10; *Rhetoric*, i. 13; Cicero, *passim*; Austin, *Lectures on Jurisprudence*, ii. pp. 250, 273, 282, 312; Maine, *Ancient Law*, ch. 3; Holland, *Elements of Jurisprudence*, 8th ed., p. 63; Lorimer, *Institutes of Law*, 2nd ed., Introduction.

*Roman.*—*Corpus Juris Civilis*, *passim*; Muirhead, *Roman Law*, pp. 247 and 257; Salkowski, *Roman Law*, p. 12; Bryan Walker, *Fragments of the Perpetual Edict of Julianus*; Otto, *Senel Das Edictum Perpetuum*.

*English.*—Lord Bacon, *Maxims*; Blackstone, *Com.* i. 61. 91; iii. 426; Spence, *Equitable Jurisdiction of the Court of Chancery*; Story, *Equity Jurisprudence*; Snell, *Principles of Equity*; Campbell, *Lives of the Chancellors*.

*Scottish.*—Stair, *Institutions*, iv. 3; Kames, *Principles of Equity*; Mackay, *Practice*, i. pp. 208–211; Dove Wilson, *Sheriff Court Practice*, p. 46.

**Erasures.**—*In Deeds generally.*—No one is supposed to execute a vitiated document, and, accordingly, in a formal deed all alterations made on the writing should be so authenticated as to show that they were made before subscription.

The same general rules apply to all alterations on deeds, except that erasures have to some extent been dealt with by Statute as after mentioned. The rules applicable to erasures in formal deeds are: (1) that words superinduced on erasures before the deed is subscribed, properly authenticated, will receive effect; (2) that alterations made after subscription will not receive effect; that if they are such as may have been made after subscription, they will be presumed to have been so made; that the onus of instructing that they were made before subscription rests on the holder of the deed; and that extrinsic evidence is not admissible (*Shepherd*, 1844, 6 D. 464; *Grant's Trs.*, 1847, 6 Bell's App. 135; *Boswell*, 1852, 14 D. 378); (3) that words superinduced on erasures will be held *pro non scriptis*, with the result that (a) where they are material and affect the structure and import of the entire deed, the deed will be invalid as a whole,—in other words, it is vitiated *in substantialibus* (*Reid v Kiddar*, 1834, 12 S. 781; 1835, 13 S. 619; affd. 1840, 1 Rob. App. 183): or where the matters or clauses are separable, the part or clause vitiated will not receive effect (*Fraser*, 1854, 16 D. 863); or (b) where the alterations are trivial, or in an immaterial portion of the deed, its validity will not (apart from fraud) be affected (*Catenach's Tr.*, 1884, 11 R. 972); and (4) that if there is fraud, the deed will be set aside (*Merry*, 1801, Mor. App., Writ, No. 3; affd. 1806, 5 Pat. 101).

In *Catenach's* case the date and date of recording of a disposition were referred to in the description of the subjects contained in a bond and disposition in security, and were written on erasures. The testing clause bore that the words were written on erasures before signing, while in point of fact the date of the bond was prior to the dates so introduced. The words were, however, held *pro non scriptis*, and the description being otherwise sufficient, the bond was sustained.



There is no statutory provision in regard to the authentication of alterations. As to the mode of doing so, see DELETION; DEEDS, EXECUTION OF; and TESTING CLAUSE. Where a deed has been executed simultaneously in *duplicate*, and the duplicates refer to each other, and the one is entire wherever the other is vitiated, erasures will be held as authenticated, and the deed will receive effect (*Strathmore*, 1837, 15 S. 449; affd. 1840, 1 Rob. App. 189).

The following cases, while inapplicable to the law on the subject of authentication of deeds as altered by sec. 38 of the Conveyancing Act, 1874, may be referred to as authorities for the statement that a mere clerical error will not militate against the authenticity of a deed: *Gaywood*, 1828, 6 S. 991; *Morison*, 1829, 7 S. 810; *Cassilis*, 1831, 9 S. 663; and *Wood*, 1838, 1 D. 14. In *Adam* (1810, F. C.) an important word, written on an erasure, was held *pro non scripto*; but there being no fraud, the remainder of the deed was sustained (see also *Glassford's Trs.*, 1864, 2 M. 1317).

On the other hand, where words were superinduced on erasures, and unauthenticated, important parts of the deeds were rendered inoperative, or the deeds were held to be vitiated in *substantialibus*, and set aside. Thus, in deeds of entail, the words "shall not be lawful to," introducing the fetters (*Fraser, supra*), and the designation of an heir-substitute (*Shepherd, supra*), having been so written, rendered the deeds ineffectual as entails. See also *Gollan* (1862, 24 D. 1410; 1868, 1 M. (H. L.) 65). In a discharge, where the sum was altered from £13 to £30, presumably a fraud, it was held that the deed was invalid, and did not prove that even the £13 had been paid (*Lawrie*, 1712, Mor. 12284). In a back letter the word "forty," in an obligation to recover lands at or prior to Martinmas 1846, written on erasure, rendered the document invalid (*Kirkwood*, 1847, 9 D. 1361). The signature of an instrumentary witness, written on erasure, has been held *pro non scripto*; and the deed, being thus attested by one witness only, was set aside (*Gibson*, 1809, F. C.; affd. 1814, 2 Dow, 270, 6 Pat. App. 441).

Where the designations of witnesses were so written, the deed was improbativ (*McCully*, 1821, 1 S. 69). An objection on the last ground may now, however, be obviated under sec. 39 of the Conveyancing Act, 1874, which provides that no deed, or writing subscribed by the granter and bearing to be attested by two witnesses subscribing, whether relating to land or not, shall be deemed invalid or denied effect on account of any informality of execution, and for the writing being upheld by proof. The section is not retrospective, and therefore does not apply to writings executed prior to 1 Oct. 1874 (*Gardner*, 1878, 5 R. 638; affd. 5 R. (H. L.) 105. See *Addison*, 1875, 2 R. 457; *McLaren*, 1876, 3 R. 1151; *Thomson's Trs.*, 1878, 16 S. L. R. 67; *Richardson*, 1891, 18 R. 1131). The defect may also be remedied if the deed has not been recorded for preservation, or founded on in any Court, by appending the witnesses' designations to their subscriptions under sec. 38 of said Act.

It may be added that a marginal addition, unauthenticated, will be held *pro non scripto* (*Carnegie*, 1695, 4 Bro. Supp. 242); but where a properly authenticated marginal addition, in a material part of the deed, has been obliterated or mutilated, the deed will be vitiated (*Cunninghamhead*, 1628, Mor. 12274).

The question whether a deed is null, or merely reducible, depends on the materiality of the word or words erased. If there is a question as to the materiality, a reduction would seem to be necessary (*Strathmore, supra*).

*Mortis causa Deeds.*—The general rule here also, when the deed is formal, is that words superinduced on erasures must be authenticated as made before subscription. Thus, in the case of *Reid, supra*,—where "ohn"



of the word "John," the name of the donee in a settlement of heritage, was written on erasure throughout the deed, the name having previously been James, and the testing clause bore that these presents "are subscribed in favour of the said John Kedder, my son"; but the erasures were not otherwise noticed,—the deed was reduced. Alterations made upon testamentary writings by the granters will not annul these deeds as a whole, unless it appears that the purpose was to do so; provided always the deeds, as altered, contain an expression of the testator's will and intention to which effect can be given. In the case of *Grant* (1849, 11 D. 860), a legacy of £500 in a formal deed was sustained where the word "five," unauthenticated, was superinduced by the testator on an erasure; but it is probable that this case will not now be followed with regard to alterations not properly adopted (*Royal Infirmary of Edinburgh*, 1861, 23 D. 1213; *Pattison's Trs.*, 1888, 16 R. 73). In any case, and whether the alterations are by the testator or not, where the matters are separable the whole deed will not be annulled. Thus the vitiation of one legacy or clause will not annul the remainder (*Kemps*, 1802, Mor. 16949; *Traquair*, 1822, 1 S. 527; *Dods*, 1857, 19 D. 820; *Pattison's Trs.*, 1888, 16 R. 73). Where the deed is *holograph*, words superinduced by the granter on erasures will be given effect to (*Robertson*, 1844, 7 D. 236).

The fact that the signature of a testator is written on an erasure will not invalidate the deed (*Brown*, 1888, 15 R. 511).

*Instruments of Sasine, etc., and Notarial Instruments.*—Errors in an instrument of sasine, if manifestly mere innocent mistakes, were not fatal (*Henderson*, 1776, and other cases, 5 Bro. Supp. 586–7; *Boyd*, 1822, 1 S. 351; *Anderson*, 1828, 6 S. 704). But if any essential word or substantial part of an instrument was written on erasure, and not duly authenticated in the notary's docket, the sasine was null (*Innes*, 1827, 5 S. 559; affd. 2 W. & S. 639; *Hoggan*, 1835, 13 S. 461; affd. 1840, 1 Rob. App. 173). Erasures which affected only one of several parcels of lands, however, did not void the sasine as regards other parcels (*Howden*, 1835, 13 S. 1097). In *Howden's* case it was questioned how far the general enumeration in the notary's docket of the number of words on each page written on erasures, without specifying the words, would obviate an objection founded on erasures. These cases, and possibly some doubt as to the Latinity of the average notary, led to the Statute 6 & 7 Will. IV. c. 33, which provides that no challenge of any instrument of sasine or resignation *ad remanentiam* shall receive effect either by reduction or exception on the ground that any part of the instrument is written on an erasure, unless it shall be averred and proved that such erasure had been made for the purpose of fraud, or the record is not conformable to the instrument as presented for registration. The Act did not apply to instruments of sasine or resignation *ad rem*. It was also provided that the validity of titles made up to remedy defects due to erasures should not be affected by the Act. This enactment was extended by sec. 144 of the Titles Act, 1868, to all instruments,—that is, under the interpretation clause (s. 3, subs. 9), all notarial instruments authorised by the said Act of 1868, or by any of the Acts thereby repealed, and also all instruments of sasine, of resignation and sasine, of cognition and sasine, and of cognition.

*Records.*—Sec. 54 of the Conveyancing Act, 1874, provides that "no challenge of any deed, instrument, or writing, recorded in any Register of Sasines, shall receive effect on the ground that any part of the record of such deed, instrument, or writing is written on erasure, unless such erasure be proved to have been made for the purpose of fraud, or the record is not

conformable to the deed, instrument, or writing as presented for registration."

*Miscellaneous.*—Summonses (when the objection has been timeously stated—*Perrier*, 1833, 11 S. 531) and steps of diligence have been held void where important words were written on erasures (see *Lyle*, 1827, 5 S. 845; *Taylor, Cowan, & Elliot*, 1829, 7 S. 547, 553, 800; *King*, 1836, 14 D. 351; *Burleigh*, 1848, 10 D. 1517; *Brown*, 1849, 11 D. 474; *Wilkie*, 1850, 12 D. 818). In the protest of a bill of exchange for summary diligence the instrument must be free from erasure, and also the record; but the erasure of an unimportant word in the extract will not be fatal (*Urichton*, 1830, 9 S. 68). Erasures in an affidavit of a creditor as to the sum claimed, not noticed at the end of an affidavit, will invalidate the creditor's vote for a trustee in bankruptcy (*White*, 1846, 9 D. 283; *Jardine*, 1848, 10 D. 1501); but the materiality of the alteration is a question of circumstances (*Dyce*, 1846, 9 D. 310). An objection to a decree of the Commissary Court, on the ground that the date was written on an erasure, has been repelled (*Dowie*, 1871, 9 M. 726).

[Bell, *Lect.* i. 68; Menzies, 136.]

**Erection, Lords of.**—After the Reformation, the king, to whom the benefices of religious houses reverted *jure coronæ*, at first appointed lay commendators for life to the vacant benefices. These life rent appointments were afterwards, in most cases, erected into temporal lordships, and thus converted into perpetual or heritable rights. The persons to whom these lordships were granted were termed Lords of Erection. As the abbots and priors whom they succeeded were used to name vicars to serve the cure of the annexed churches, the lords of erection, as coming in their place, nominated ministers, and their grant was burdened with the duty of providing these ministers with a competent stipend (Stair, ii. 8. 35; Ersk. ii. 10. 18; Connell, *Tithes*, i. 98. 113; Bell, *Prin.* s. 1147).

**Error.**—I. *ERROR AS A GROUND OF REDUCTION.*—Error on the part of one undertaking an obligation is, in certain circumstances, a ground for reducing the obligation. Such error must be (1) in the essentials of the contract; (2) must be mutual, *i.e.* common to both parties: or the parties to an agreement, ambiguous in its terms (and so capable of two or more constructions) must have been at cross-purposes as to its meaning; or (3) must be induced by the other party to the contract, either fraudulently or innocently; (4) in case of a unilateral deed, must be excusable ignorance of the nature of the deed signed, or of a right given up or discharged. "Error becomes essential whenever it can be shown that, but for it, one of the parties would have declined to contract" (per Lord Watson, *Menzies*, 1893, 20 R. (H. L.) 142), and may be error in fact or in law (*Mercer*, 1871, 9 M. 618; *Stewart v. Kennedy*, *infra*; Kerr on *Fraud and Mistake*, 2nd ed., p. 466; see, too, *Cooper*, 1867, L. R. 2 H. L. 149).

The essentials of a contract into which error may enter, and so vitiate consent, are exhaustively stated in Bell's *Principles*, s. 11, in an enumeration approved of by all the judges in the leading case of *Stewart* (1889, 16 R. 857; 1890, 17 R. (H. L.) 25). Lord Watson there said: "I concur with all their Lordships as to the accuracy of the general doctrine laid down by Professor Bell, to the effect that error in substantials, such as will invalidate consent given to a contract or obligation, must be in relation to either (1)

its subject-matter; (2) the persons undertaking, or to whom it is undertaken; (3) the price or consideration; (4) the quality of the thing engaged for, if expressly or tacitly essential; (5) the nature of the contract or engagement supposed to be entered into. I believe that these five categories will be found to embrace all the forms of essential error which, either *per se* or when induced by the other party to the contract, give the person labouring under such error a right to rescind it." In illustration of this division typical cases may be cited.

(1) *Error in the Subject-Matter of an Agreement*.—The Earl of Wemyss obtained from Campbell the lease of a "deer forest." It happened that, during the shooting season, no stags frequented that tract of land, only a few hinds. The Court here held that the Earl had not obtained what he bargained for: and that his belief that he was getting a sporting estate, whereas, in truth, he was becoming tenant merely of a picturesque spot where hinds grazed, amounted to error *in essentialibus* (*Earl of Wemyss*, 1858, 20 D. 1090). So in the case of *Hamilton* (1861, 23 D. 1033) the Court held that an error in the description of a subject sold, which had the effect of curtailing its extent and so depriving the purchaser of buildings upon the ground cut off, was material to set aside the contract, as being a mistake in the identity of the subject sold. A somewhat similar case is that of *Stewart v. Hart's Trs.* (1875, 3 R. 192). There a proprietor advertised lands for sale at the price of £75, and subject to a feu-duty of £9, 15s. Hart became purchaser. Before buying, Hart was aware that the feu-duty was in truth but 3s. In carrying through his bargain, however, he emphasised the enormity of the feu-duty as advertised, and so obtained the subject at the reasonable price of £75. The Court, while founding their judgment largely on the circumstance that Hart's conduct had narrowly bordered on fraud in taking advantage of the seller's ignorance, were of opinion that the seller was labouring under essential error in making the contract, which was accordingly set aside. Where parties contract about a subject which, unknown to both, has perished at the date of their consent, there is clearly error as to the subject. So where a shipper had entered into an arrangement for the charter of his ship at a date when the ship was lost, Lord Young said: "I rather approve of the view that, there being nothing to show that the vessel was in existence at the date of the contract, but everything to suggest the reverse, the contract consequently was void altogether from the beginning, and never came into operation at all" (*Gibson*, 1896, 34 S. L. R. 114; *Couturier*, 1856, 5 H. L. C. 673). But where one sold vats, being part of the furnishings of a paint factory, for £2 each, and they were afterwards found to contain white-lead valued at £300, the Court refused to hold that there was error to set aside the contract, as the intention of parties was to contract for the plant of the factory as it stood. *Ld. Fullerton* said: "There may be a great deal in the view of Pothier on the subject of the golden tripod found in the net. That goes on the ground that the article found was essentially different from that for which the parties were dealing; and the rule might have been applicable here if there had been any such essential difference between the article exposed and the article found, as between fish and a golden tripod. The case to be put on the *jactus retis* applicable to the present case would be, not the catching of a golden tripod, but of an unexpected quantity or unusually valuable quality of fish" (*Dawson*, 1851, 13 D. 843).

(2) *Error as to the Person undertaking or to whom it is undertaken*.—Under this heading there are few recorded instances. In 1751 Dunlop made several shipments of goods to Forbes & Crookshanks, who were partners.



The partnership being dissolved, Forbes (by a deceit) induced Dunlop to believe that it continued, and so to ship a further consignment. In a question between Dunlop and Forbes' creditors, *held*: that the goods had never ceased to be the property of Dunlop, who had never meant to contract with Forbes, but with the firm of Forbes & Crookshanks: and Dunlop accordingly found entitled to the price of the goods (*Dunlop*, 1752, M. 4879). A case very similar to this came before the English Courts. Jones had been for some time a customer of Brocklehurst. Brocklehurst retired and made over his business to Boulton. Jones was not made aware of the change, and sent in an order, which Boulton filled. When Boulton came to sue Jones for the price of goods thus supplied, it was held that he could not maintain the action. Pollock, C. B.: "It is a rule of law that if a person intends to contract with A., B. cannot give himself any right under it" (*Boulton v. Jones*, 1857, 2 H. & N. 564). This case was recognised as authoritative, and followed in *Grierson, Oldham, & Co.* (1895, 22 R. 812; and see *Cundy*, 1878, 3 App. Ca. 459). Perhaps within this category should be ranked those cases where parties have dealt with a right on the footing that one of them possessed a character to which he had no true title: as where a lady, in the belief that she was vested in the fee of lands, received payment of a sum due under a bond, and granted her obligation to give a good discharge. When she discovered her error (that she was a mere liferenter, and not fiar of the estate), she refused to grant the discharge, and offered to refund the money which she had, in ignorance of her true character of liferenter, received. She was held released from her undertaking to grant the discharge, and found entitled to pay back the money (*Miller*, 1831, 9 S. 542; cf. *Cooper*, 1867, L. R. 2 H. L. 149).

(3) *Error as to the Price or Consideration.*—*Gray* (1879, 7 R. 332) and *Menzies* (1893, 20 R. (H. L.) 123) are illustrations of contracts entered into by sons with their parents, as to entailed estates, under error as to the value of their interest. In both cases the error was held to be *in essentialibus*.

(4) *Error as to the Quality of the Thing engaged for.*—Wilson contracted to drive a tunnel for the Caledonian Railway Company, and, relying on plans, schedules, and specification produced, tendered for a price which turned out to be wholly inadequate owing to the nature of the strata through which he had to bore. At the date of sending out the specifications the company and their engineer knew the nature of the strata; but they misrepresented its true character. The issue allowed was one of error induced by the misrepresentations of the defender (*Wilson*, 1860, 24 D. 1408).

(5) *Error as to the Nature of the Contract* is best exemplified in the case of *Stewart v. Kennedy* (1890, 17 R. (H. L.) 25). There Stewart made Kennedy an offer for the sale, at a named price, of the Murthly entailed estates. Kennedy accepted in terms. The offer contained a stipulation "the sale is made subject to the ratification of the Court." The offer was held by the Court to mean sale at the price named, on the consent of the Court to the disentail being obtained. Stewart maintained that he intended to sell only if the Court, on a consideration of the circumstances, should be of opinion that this was a fair price. It was held that this was error in the essentials of the contract. Lord Herschell thought that this error "affected both parties to the contract; for it concerned them both whether the sale was an absolute one, or to take effect only if the Court were so well satisfied that the price and other conditions were proper, as to order a sale on those terms, and I cannot say that the alleged error was one which did not touch the price."



Two issues are appropriate to try the question of essential error: 1. an issue of essential error pure and simple; 2. an issue of essential error induced by misrepresentation (cf. *L. P. Hope, Hogg*, 1864, 2 M. 848). The former issue will be granted (1) where the parties were at cross-purposes in the case of an ambiguous contract; (2) where they were labouring under a mutual error which they shared, and on the faith of which they contracted; and (3) where the granter of a unilateral deed signed it in ignorance of its true nature or of his own rights.

1. *Essential Error*.—(1) Questions of the construction of writings are for the decision of the Court; and if one of the parties to a contract has put upon its terms a construction which the Court holds to be well founded, the other party will not be heard to say that he put another and different construction on the words used, and so contracted in error, unless he show that his error was induced by the other party to the contract. In *Stewart's* case (*supra*), Lord Herschell said, with reference to the pursuer's contention that, in respect that he had put upon his contract a meaning different from that which the Court had decided to be the sound construction, he was entitled to an issue of essential error pure and simple: "This contention is certainly a sufficiently startling one. He made the respondent an offer which all the Courts have held to bear a certain construction. This offer the respondent accepted. And now it is sought to reduce the contract, simply on the ground that the appellant did not intend to make the offer which the Courts have held that he did make. Such a contention is far-reaching in its consequences. It would apply in every case where the parties differed in their construction of an essential part of the contract. After litigating the matter through all the Courts, it would always be open to the defeated litigant to reduce the contract, provided he could show that he understood the contract to bear the interpretation for which he had contended." It is where ambiguity of expression will support two constructions, and one of the parties used the words with one meaning and the other party employed them with their alternative signification, that an issue of essential error will be allowed (see Addison on *Contract*, 9th ed., 118). Such agreements are of necessity rare, but there is one very remarkable instance upon record in *Raffles* (1864, 2 H. & C. 906). There the plaintiff sold to the defendant one hundred and twenty-five bales of Surat cotton, to arrive *ex* ship *Peerless* from Bombay. Now, it so happened that there were two ships of that name sailing that autumn from Bombay, the one in October and the other in December, and that the defendant meant the former, while the plaintiff meant the latter. The contract was accordingly held void from the beginning.

In *Buchanan* (1878, 5 R. (H. L.) 69) "a person made an offer for the lease of a farm which was entertained, but neither accepted nor declined. After a few weeks he subscribed a second offer. There was no written acceptance, but the tenant entered upon the farm and remained in possession for two years. Dispute having arisen, the tenant was called on to execute a lease in terms of the second offer, which he declined to do. In an action brought by the landlord it was proved that the tenant understood that the second offer was to be read along with the first, but the landlord understood that the second superseded the first. Held that there was no *consensus in idem*, and therefore no contract." Lord Blackburn (p. 82): "If the one thought it was black and the other thought it was white, the possession under that mutual mistake would operate nothing as to making a lease."

(2) *Mutual Error*.—Where parties contract on a joint assumption of a

certain state of facts or law, if their assumption was unfounded there was no contract (*Mercer*, 1871, 9 M. 618, 10 M. (H. L.) 39, L. R. 2 Sc. Ap. 223). There a father and his daughter entered into a contract by which the daughter discharged all her claims under her father's antenuptial settlement. At the time of making the contract the father and daughter were in error as to the sound construction of the settlement, and bargained on the footing that, in terms of the settlement, the daughter had no vested interest in her deceased mother's estate. On a sound construction the daughter had a vested interest in her mother's estate; and was held entitled to reduction of the discharge after her father's death. Lord Ardmillan is reported (p. 649) to have said: "If there was mutual error—error on the part of both the father and the daughter—on an essential point . . . and if, under mutual error, the daughter granted, and the father took, a discharge on the erroneous footing that she had no such rights, then the discharge cannot stand. Essential error is a well-recognised ground for setting aside a deed of this nature. It may be mutual error and innocent, or it may be error in one party caused by misrepresentation by the other party. In either case essential error is a good ground of reduction. 'Those who err in the substantial of what is done, contract not' (Stair, 1. 10. 13)." So where the contract was for the discharge by A. of "all his claims," and it appeared that there were claims of which the parties were ignorant, the contract was held reducible on the simple issue (*Purdom*, 1856, 19 D. 206; *Dickson*, 1854, 16 D. 586; *Johnstone*, 1857, 3 Macq. 619; *Miller*, *supra*, 1851, 9 S. 542). And where A. agreed to lease a fishery from B. on the assumption that A. had no estate and that B. was the tenant in fee, and it turned out that A. was fiar and that the parties had consented in error, the lease was held invalid (*Cooper*, 1867, L. R. 2 H. L. 149; cf. *Jones*, L. R. 3 Ch. D. 779; and cf. *Scrabster Harbour Trs.*, 1864, 2 M. 884). So it was held, in England, that the Court has power to set aside a consent order, where it has been completed and acted on without affecting the interests of third parties, where the order has been obtained by mutual mistake (*Huddersfield Banking Co.*, 1895, 2 Ch. 273; see, too, Lord Ormisdale in *Baird's Trs.*, 1877, 4 R. at p. 1011). Where, however, the transaction between the parties is really a compromise, or where the position of parties is materially altered, there is no room for the plea of essential error (*Grieve*, 1828, 6 S. 454; *Bankier*, 1865, 3 M. 536; *Kippen*, 1874, 1 R. 1171; Kerr on *Fraud and Mistake*, 2nd ed., 474).

(3) In the case of unilateral deeds the decisions fall under two heads: (a) where the signatory signs one deed in the belief that it is another of different import; (b) where rights are discharged *sine causa* in ignorance of their true value. (a) In *McLaurin's case* (1875, 3 R. 265) an old lady and gentleman sought reduction of a disposition granted by them in favour of their daughter. They averred that they signed the deed in the belief that it was testamentary and revocable. They were but imperfectly acquainted with the English language, in which the deed was written, and, although it was hurriedly read over to them, they did not understand its contents. They were granted an issue of "essential error as to the substance and effect of the said deed." But *Munro* (1874, 1 R. 522), decided in the other Division, appears to be in contradiction to this decision. In *Ritchie* (1866, 4 M. 292), Id. Pres. McNeill said: "No doubt essential error is a ground for setting aside a deed, as where a party alleges that he signed one deed for another. There are different kinds of essential error, and that is one of them. Another kind of error is where a party grants a deed of an ambiguous nature, and which may have a more comprehensive meaning

than he thought it had, or which may carry rights which he never intended to convey at the time he executed it."

(b) It is settled by a long series of decisions that discharges, granted by wives and children of provisions, *sine causa* and in ignorance of their legal rights, may be reduced (*Lady Forbes*, 1765, 2 Pat. App. 84; *Dickson*, 1854, 16 D. 586; *McLeod*, 1870, 8 M. (H. L.) 99; cf. *Purdum*, 1856, 19 D. 206). Compare the case where a trustee in bankruptcy is discharged in ignorance that assets vested in the bankrupt have not been recovered. Such discharge does not reinvest the assets in the bankrupt; but the Court will, on their discovery, appoint a new trustee (*Whyte*, 1891, 18 R. (H. L.) 37 A. C. 608).

2. *Essential Error induced*.—The law as to "essential error induced" by the representations of one party to a contract has been finally laid down in the House of Lords in the cases of *Stewart*, 1890, 17 R. (H. L.) 25, and *Menzies*, 1893, 20 R. (H. L.) 123. On the assumption that one of the parties to a contract reduced to writing has put a sound construction on its terms, the other party can reduce on the ground of essential error only by showing that his error was induced by the first party. Error induced by a third party is of no effect (*Breeford's Trs.*, 1877, 4 R. 363; *Young*, 1889, 17 R. 231). "Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that, in the case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the obligations which he has undertaken will not be sufficient to give him the right, unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract" (per Lord Watson, 17 R. (H. L.) 29). And again, in *Menzies'* case, his Lordship said (20 R. (H. L.) 142): "Error becomes essential whenever it can be shown that but for it one of the parties would have declined to act. He cannot rescind unless his error was induced by the representations of the other contracting party, or of his agent, made in the course of negotiation and with reference to the subject-matter of the contract. If this error is proved to have been so induced, the fact that the misleading representations were made in good faith affords no defence against the remedy of rescission. That principle has been recently affirmed by the House in *Adam* (1888, L. R. 13 App. Ca. 308); *Stewart* (1890, L. R. 15 App. Ca. 108, 17 R. (H. L.) 25); and in *Erans*, decided this week [not reported]." As to error of one party known to, and taken advantage of by, the other, see Kerr, 2nd ed., 486; *Stewart*, 1875, 3 R. 192, *supra*.

II. *PAYMENT IN ERROR*.—Money paid in error may be recovered if the mistake was one of fact (Stair, i. 7. 9; Ersk. 3. 3. 54; Bell, *Prin.* 531). "I think that the general rule of our law is that there is difficulty in sustaining an action of *condictio indebiti* in consequence of the party's ignorance of law; and no effect will be given to such ignorance except in very special circumstances. There are some errors in law that you cannot listen to a party pleading ignorance of" (L. P. McNeill in *Dickson*, 1854, 16 D. 586). So L. P. Inglis in *Balfour* (1877, 4 R. 454): "A party having made a payment in error must, before he can recover, show that the error was not induced by his own fault, but was due to adverse circumstances, or the fault of the other party." And Lord Shand said (p. 462): "The defender has no right to retain money paid to him under a mistake in fact. I am satisfied that the sound rule applicable to such circumstances is that stated by Mr. Justice Williams in *Townsend* (8 C. B. (N. S.) 477): 'Since the case of *Kelly* (9 M. & W. 54) it has been established that it is not enough that a party had the means of learning the truth if he had chosen to make inquiry. The only limitation



now is, that he must waive all inquiry.'” Accordingly, where a person paid money in the knowledge that it was not due, he was not entitled to recover, on the ground that he must be presumed to have waived all objections and admitted the debt (*Dalmellington Iron Co.*, 1889, 16 R. 523). “While it is true that a failure of consideration is a good ground for the recovery of money paid, it is a familiar and well settled principle of law, that where a person, with full knowledge of all the circumstances, pays money voluntarily and without compulsion, he shall not afterwards recover back the money so paid. But money paid by a mistake of fact, which causes an unfounded belief of a liability to pay, may generally be recovered back, even if the mistake arises from negligence, but not if the mistake affects only the motives of the party in paying the money, and not his obligation to pay it” (Parsons on *Contracts*, vol. i. 467). An analogous case occurred where a railway clerk delivered goods, without a proper delivery-order, to the wrong person, and the company were held entitled to demand their redelivery, no third party having suffered through the mistake (*The Caledonian Ry. Co.*, 1879, 7 R. 151). See *CONDICTIO INDEBITI*.

III. *CLERICAL ERROR*.—Errors of the nature of clerical blunders, or errors *calculi*, may be set right or overlooked. A sasine was held not vitiated by reason of a clerical error in its text (*More*, 1851, 13 D. 1381; *Johnston*, 1865, 3 M. 954). In *Ritchie* (1849, 12 D. 119), held competent to rectify an interlouctor not extracted; and in *Miller* (1850, 12 D. 964), to correct a clerical error in extract decree. So, too, the *Liquidators of the Benhar Coal Co.* (1891, 19 R. 108), by note to the Court, obtained authority to correct an error in an extract decree; and in *Petition, Sandeman* (1892, not reported), the Court granted authority to correct clerical errors which had originally appeared in the summons of an action, and thence been transferred to the Register of Sasines. The agents of the petitioners were authorised, at sight of the Keeper of Records, to make the correction (see *Steeen*, 1848, 10 D. 1287). Where, through error, a bond bore to be in favour of William, instead of Matthew, Waddell, the Court holding itself not justified in making so radical an alteration, allowed Matthew to reduce the bond on the ground of essential error (*Waddell*, 1863, 1 M. 635). A somewhat similar case is that of *The N. B. Insurance Co.* (1864, 3 M. 1). A. and B., in contemplation of their marriage, jointly effected an insurance over their lives for £400, payable on the death of either of the spouses. In framing the policy the officers of the insurance company, by mistake, made the sum payable “to the executors or assignees of the assured.” In a competition between the surviving spouse and the trustee on the sequestrated estate of the predeceasing, held that this was a clerical error on the part of the insurance company, and that the trustee was not entitled to found on the error, to the effect of defeating the rights of the survivor. On like grounds, the Court rectified an error in a plan. By feu-contract a superior bound himself to make roads as delineated and coloured brown on a relative plan. A number of roads other than those intended were coloured. This was not observed for several years, when a new vassal entered, and sued the superior for the cost of making these extra roads. When he purchased, the new vassal did not know of the condition expressed on record. The Court treated the wrong colouring as a clerical error, and put it right (*Glasgow Freuing and Building Co.*, 1887, 14 R. 610). As to error *calculi*, see *Gordon*, 1829, 7 S. 323; *Brown*, 1848, 10 D. 867. It is a question whether a clerical error in a Statute may be overlooked (*M. of Breckinshaw*, 1846, 8 D. 1062).

[The reader is referred to Anson on *Contracts*, 8th ed., 127–142; Pollock



on *Contracts*, 6th ed., 420-502; Addison, 9th ed., 118 *et seq.*; Kerr on *Fraud and Mistake*, 2nd ed., 466.]

See FRAUD; DISCHARGE; REPETITION.

**Escape of a Prisoner.**—A prisoner who escapes from a prison where he is lawfully confined is guilty, at common law, of PRISON-BREAKING (*q.v.*).

By the Act 16 Geo. II. c. 31, it is criminal to aid or assist prisoners to attempt to escape out of lawful custody. By this Statute it is provided (s. 1) that any person aiding or assisting in the escape from jail of any prisoner convicted of treason, or any felony, except petty larceny, shall be guilty of felony, and liable to penal servitude for seven years; and if such prisoner was in jail convicted of petty larceny, or any other crime, not being treason or felony, any person aiding or assisting him to escape shall be guilty of a misdemeanour, and liable to punishment by fine and imprisonment. Any person (s. 2) conveying any disguise, instrument, or arms to help the escape of a prisoner convicted of treason or felony, shall be guilty of felony, and liable to penal servitude for seven years: and if such prisoner was confined for any less crime, the offence shall be a misdemeanour, punishable by fine and imprisonment. Any person (s. 3) assisting a prisoner, charged with treason or felony, to escape from a constable or other lawful officer, shall be guilty of felony, and liable to penal servitude for seven years. Prosecutions for these offences (s. 4) must be commenced within one year after the offence has been committed.

The Act 52 Geo. III. c. 156, deals with the offence of assisting prisoners of war to escape. By sec. 1 it is provided that every person who aids or assists a prisoner of war to escape out of Her Majesty's dominions shall be guilty of a felony, and liable to penal servitude for fourteen or seven years. It amounts to an offence under the Act (s. 2) if a prisoner of war under parole be aided in escaping from that part of Her Majesty's dominions where he may be under parole, although no assistance be given such person in quitting the coast of Her Majesty's dominions. It is an offence under the Act (s. 3) to give an escaping prisoner of war assistance on the high seas.

If a messenger-at-arms culpably allows a debtor to escape whom he has, or might have, arrested, he will be liable for the amount of the debt in the diligence.—[Stair, iv. 48. 20; Ersk. iv. 3. 14; Hume, i. 527, note 3; Bell, *Com.* ii. 438.]

**Escheat.**—This term is derived from the French word *échoir*, to happen or fall, and signifies confiscation or forfeiture of a man's estate. Escheat is either single or liferent. Single escheat, which is the forfeiture to the Crown of a man's moveable estate, is part of the penalty of a capital sentence. It is also included among the statutory pains of bigamy, deforcement, profanity, and perjury, and it falls upon denunciation following on a sentence of outlawry. Prior to 1748 both single and liferent escheat followed upon denunciation and putting to the horn for non-payment of a civil debt or non-performance of an obligation. But the Act 20 Geo. II. c. 50, abolished the casualties of single and liferent escheat incurred by denunciation for civil debts.

Liferent escheat is the forfeiture to the superior of the rents of the vassal's lands during his life, or while he remains a rebel. Liferent escheat

follows upon sentence of outlawry, if the rebel remains unrelaxed for a year. It probably also falls where a convict, sentenced to death, makes his escape, and endures until the convict is recaptured or surrenders. In the case of liferent escheat, the fee remains in the vassal, and he may dispose of this, provided he does not thereby prejudice the rights of the party entitled to the liferent escheat (*M'Crac*, 1839, MacL. & R. 645).

In Scotland, on a conviction of treason, all the accused's property, heritable and moveable, is forfeited to the Crown. In England, escheat does not now follow on a conviction of treason or felony (33 & 34 Vict. c. 23).

[Hume, i. 546; ii. 271, 482; Ersk. ii. 5. 53; Ross, *Lect.* i. 274; Bell, *Prin.* s. 730; Bell, *Conv.* i. 539, 627.]

See CONFISCATION; FORFEITURE; FUGITATION; OUTLAWRY.

**Esquire.**—See ARMIGER.

**Estate Duty under 52 Vict. c. 7.**—The Customs and Inland Revenue Act, 1889, imposed a duty which is known as the temporary estate duty, the charge being declared inapplicable in the case of persons dying on or after 1 June 1896. It is a stamp duty, and is placed under the care and management of the Commissioners of Inland Revenue (s. 9). Further, it is a duty in addition to all death duties other than legacy duty (s. 5 (5), s. 6 (4)); but it is to be observed that it is not leviable in respect of any property chargeable with duty under the provisions of the Finance Act, 1894 (see sec. 1, Sched. 1, and sec. 24 of that Act). It is not a "probate duty" in the sense of 51 & 52 Vict. c. 60, s. 5.

The rate of the duty is one pound for every full sum of £100, and for any fraction of £100 over any multiple of £100 (s. 5 (4), s. 6 (2)).

It is chargeable (1) upon property included in affidavits or inventories and accounts, and (2) upon successions.

1. Sec. 5 (1) provides that where, in the case of any person applying for probate or letters of administration granted in England or Ireland on or after 1 June 1889, or exhibiting an inventory in Scotland on or after that day, the value of the estate and effects in respect whereof duty is charged on the affidavit or inventory by sec. 27 of 44 Vict. c. 12, exceeds £10,000, he shall, together with such affidavit or inventory, deliver a statement of the value of such estate and effects, to be transmitted, with the affidavit or inventory, to the Commissioners of Inland Revenue.

It is to be observed that estate duty payable under sec. 5 is payable in the first instance out of the general residuary personal estate (*Re Bourn*, L. R. [1893], 1 Ch. 188); and that the intention of the section is to grant the duty whenever the whole estate of a deceased person exceeds £10,000, without any reference to the question of what any particular individual takes (*Attorney-General v. Aberdare*, L. R. [1892], 2 Q. B. 684).

Sec. 5 (2) provides that where the value of the personal or moveable property included in an account delivered according to sec. 38 of 44 Vict. c. 12, on or after 1 June 1889, exceeds £10,000, the person delivering the account shall also deliver, together therewith, a statement of the value of such property.

Sec. 5 (3) provides that where a further affidavit is required to be delivered (44 Vict. c. 12, s. 32), or an additional inventory is required to be exhibited (see INVENTORY DUTY), and the value of the estate and effects

contained in the former affidavit or inventory exceeds £10,000, the person delivering the further affidavit, or exhibiting the additional inventory, shall deliver therewith a statement of the value of the estate and effects included therein, or of the increase of value of the estate and effects included in the former affidavit or inventory, as the case may be. Where, however, the value of the estate and effects contained in the former affidavit or inventory does not exceed £10,000, and such value, together with the value of the estate and effects included in the further affidavit or additional inventory delivered or exhibited, or the increased value, as the case may be, exceeds £10,000, the person aforesaid shall deliver a statement of the estate and effects included therein, and in the former affidavit or inventory, or of the value as increased of the estate and effects included in the former affidavit or inventory, as the case may be.

These provisions are not operative where a further or additional inventory is delivered or exhibited of any estate or effects of a deceased person after a former affidavit or inventory of the estate and effects of the same person has been delivered or exhibited and recorded prior to 1 June 1889 (s. 5 (7)).

In Scotland, a return of duty overpaid on any statement delivered under sec. 5 shall be made in like manner as a return in the case of stamp duty overpaid on an additional inventory (see INVENTORY DUTY). In England and Ireland, the provisions of 44 Vict. c. 12, s. 31, are made applicable (s. 5 (6)).

2. Sec. 6 (1) provides that where the value of any succession upon the death of any person dying on or after 1 June 1889 chargeable with duty under the Succession Duty Act, 1853, and the Customs and Inland Revenue Act, 1888, exceeds £10,000, and where the value of any succession to real property under the will or intestacy of any person so dying chargeable with duty under the said Act does not exceed £10,000, but such value, together with the value of any other benefit taken by the successor under such will or intestacy exceeds £10,000, a separate statement of the value of the succession shall be delivered to the Commissioners of Inland Revenue, together with the account under sec. 45 of the Succession Duty Act, 1853 (see LEGACY AND SUCCESSION DUTIES). It is to be observed that the Act means by "succession" not the interest of any particular recipient, but whatever passes on the death (*Attorney-General v. Aberdare*, L. R. [1892], 2 Q. B. 684).

Sec. 6 (5) directs that the value upon which the duty in respect of a succession to real property is to be charged and assessed shall be ascertained in accordance with the Succession Duty Act, 1853, subject to the following provisions:—(a) In the case of a successor who is entitled to the real property comprised in his succession for an estate in fee-simple, or in fee according to the custom of any manor, or for lives renewable under any custom or under any lease for lives, or for any estate in tail, or under an entail under which he can acquire the property in fee-simple without consent of any person, or is entitled to any such property for life, and competent to dispose as he shall think fit of a continuing interest therein, the value shall be the principal value of such property, based upon the annual value after making such allowances (if any) as ought to be made under the said Act. The duty payable in respect of such principal value shall not in any case exceed the amount which would be chargeable upon an annuity equal to such annual value according to the highest value in Table III. in the schedule of the Succession Duty Act, 1853; (b) In the case of an increase of benefit accruing to a successor, and chargeable to succession duty by reference to secs. 5, 20, or 25 of the Succession Duty Act, 1853, where the value of the succession, apart from the increase of



benefit, shall exceed £10,000, such increase of benefit shall be chargeable with duty under this section, whatever may be the value thereof; and where the value of the succession, apart from the increase of benefit, shall not exceed £10,000, the value of such increase of benefit, as well as of every preceding increase of benefit, shall be added to the value of the succession for the purpose of the said duty.

The duty imposed by sec. 6 shall, subject to the provisions of this Act, be assessed and paid in like manner as succession duty, and be subject to the enactments relating to that duty, so far as the same are applicable (s. 6 (4)). Further, the duty shall, in the case of real property, be a first charge thereon, or on the successor's interest therein, according as it is or is not chargeable on the principal value of such property, and shall be paid in like manner as if the duty were a part of the succession duty payable under 51 Vict. c. 8, s. 22, and together with the payments in respect of that duty (s. 6 (6)). See LEGACY AND SUCCESSION DUTIES.

The duty imposed by sec. 6 shall not be payable upon the value of leaseholds passing by will or devolution by law, or of property included in an account delivered according to 44 Vict. c. 12, s. 38, as amended by this Act (see ACCOUNT DUTY), in respect of which value duty has been paid under sec. 5 of this Act (s. 6 (3)).

The penalty of double the amount of the duty chargeable is imposed for failure to deliver a statement as required by the Act (s. 8 (1)). Acceptance or recovery by the Commissioners of arrears of duty with interest thereon at the rate of three per cent. (see 59 & 60 Vict. c. 28, s. 18), is an absolute waiver of any penalty incurred.

[Hanson, *Death Duties*, 4th ed., p. 382 *et seq.*: Norman, *Digest of Death Duties*, p. 150 *et seq.*]

See ACCOUNT DUTY: INVENTORY DUTY: LEGACY AND SUCCESSION DUTIES.

**Estate Duty under Finance Act, 1894** (57 & 58 Vict. c. 30), ss. 1 to 24; amended by Finance Act, 1896 (59 & 60 Vict. c. 28), ss. 14 to 24.

Estate duty is a tax first imposed by the leading Act, and leviable upon the principal value of all property, heritable or moveable (real or personal), whether settled or not, passing on the death of any person dying after 1 August 1894 (s. 1). It comes instead of the inventory and account duties of the Acts of 1881 and 1889, the additional succession duty of the Act of 1888, the temporary estate duty of the Act of 1889, and the one per cent. legacy and succession duties payable by lineals. The other provisions of the Act are designed to explain and define this cardinal enactment.

#### PROPERTY INCLUDED.

(1) Property held absolutely by, or in trust for, the deceased.

(2) Property in or over which the deceased had, at the time of his death, such an estate or interest, or such general power, as would (if he were *svi juris*) enable him to appoint to or dispose of it as he thinks fit, whether *inter vivos* or *mortis causa* (ss. 2 (1a) and 22 (2)).

(3) Property of an English or Irish "tenant in tail, whether in possession or not" (ss. 2 (1a) and 22 (2)).

(4) Property in certain cases of a Scottish institute or heir of entail in possession (ss. 2 (1a) and 23 (15)). But see *infra* as to Scottish entails.

(5) Money which the deceased had a general power to charge on property (ss. 2 (1a) and 22 (2c)).



(6) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, *i.e.* settled property in which there was a life interest, annuity, or other subsidiary interest which ceases or expires on the death of the deceased life interester or annuitant, but only "to the extent to which a benefit accrues or arises by the cesser of such interest" (s. 2 (1b)). As to the value of the benefit, see s. 7 (7).

(7) Donations *mortis causa* made by the deceased (s. 2 (1c)).

(8) Gifts *inter vivos* under voluntary dispositions purporting to operate immediately, but not *bonâ fide* made twelve months before death (s. 2 (1c), and Acts there mentioned). See *McCourt*, 1893, 20 R. 488; *General Booth*, [1894], 63 L. J. Q. B. 356; *Foster* [1897], 1 Ch. 484.

(9) Gifts, whenever made, by deceased, where *bonâ fide* possession and enjoyment were not immediately assumed by the donee, and retained to entire exclusion of the donor (s. 2 (1c)).

(10) Property to which the deceased was absolutely entitled, but which he caused to be vested in himself and another jointly, or (by arrangement) in himself alone, so that the beneficial interest should pass by survivorship to that other (s. 2 (1c)).

(11) Property passing under a settlement or trust made by the deceased by deed, or any other instrument not operating as a will, whereby he reserved to himself a life-interest therein, or power to reclaim the property itself (s. 2 (1c)).

(12) Money received on a policy effected by the deceased on his own life, and kept up for the benefit of a donee (2 (1c)). Cf. *Robertson*, 1895, 22 R. 568; *affd.* 18 Feb. 1897.

(13) Annuities purchased or provided by the deceased alone, or by arrangement with another, to the extent of the beneficial interest accruing by survivorship or otherwise on the deceased's death (s. 2 (1d)). But see limitation under sec. 15 (1).

#### PROPERTY EXCLUDED.

(1) Property in which the interest was that of the holder of an office or the recipient of the benefits of a charity or a corporation sole (s. 2 (1b)). The sovereign and English Church dignitaries and parsons are corporations sole.

(2) Property situated out of the United Kingdom where no legacy or succession duty was payable under the old law, whatever the relationship of the person to whom it passes (s. 2 (2)).

(3) Property held by the deceased as trustee for another, *either* (a) under a disposition not made by the deceased; or (b) under a disposition made by the deceased within twelve months before death; or (c) under a disposition made by the deceased more than twelve months before death, but where possession and enjoyment of it were not *bonâ fide* assumed by the beneficiary immediately upon the creation of the trust, and thenceforward retained, to the entire exclusion of the deceased, or of any benefit to him by contract or otherwise (s. 2 (3)).

(4) Property passing on death by force of transactions for full consideration in money or money's worth, whether (a) a purchase from the person under whose disposition the property passed, or (b) the falling into possession of the reversion on any lease for lives, or (c) the determination of any annuity for lives (s. 3).

(5) Settled property in respect of which estate duty has been paid since the date of the settlement, but only till the death of a person competent to dispose of it (s. 5. (2)).

(6) Settled property, the interest of the deceased in which failed or determined by his death before it became an interest in possession (subsequent limitations continuing) (s. 5 (3)).

(7) Property of common seamen, marines, and soldiers dying in the service of Her Majesty (s. 8 (1); 55 Geo. III. c. 184, Sched. III.; and 44 Vict. c. 12, s. 26).

(8) Sums under £100 which, under the law prior to 1894, could be paid without confirmation (s. 8 (1); 37 & 38 Vict. c. 42, ss. 29 and 30; 50 & 51 Vict. c. 40, s. 3; and 56 & 57 Vict. c. 39, s. 39).

(9) A single annuity not exceeding £25, purchased or provided by the deceased alone or in concert with another, being *either* a joint annuity to himself and another and the survivor, *or* an annuity to arise on his own death in favour of another; if there be more than one such annuity, the first only is exempted from duty (s. 15 (1)). It would appear that if there were two or more annuities together not exceeding £25, only the first would be exempt; again, if there were two annuities of which the first exceeded, and the second did not exceed, £25, the second only would be exempt; and if a joint annuity exceeds £25, duty would be payable on the portion (though less than £25) passing on the death of the first decessor to the survivor.

(10) Pictures, prints, books, manuscripts, works of art or scientific collections, of national, scientific or historic interest, if given to any university, county council, or municipal corporation, may have all the death duties remitted by the Treasury (s. 15 (2)).

(11) The same class of objects and "other things not yielding income," if settled and enjoyed in succession under a private trust by persons not competent to dispose of them, are exempt from estate duty; but when they are sold or come into possession of one competent to dispose of them, they are liable (Act 1896, s. 20).

(12) Pensions or annuities payable by the Government of British India to widows or children of deceased Government officers (s. 15 (3)). The similar annuities of the widows' funds of various public bodies are not exempted. See Lorimer's *Death Duty Clauses of Act 1896*, p. 8 *et seq.*

(13) Advowsons or Church patronages which are free from succession duty (s. 15 (4)). There is now no Church patronage in Scotland.

(14) Estates under £100 (s. 17).

(15) Personal property settled by a will or disposition of one dying before 2 August 1894, which has paid, or is liable to pay, the inventory or account duty then due, unless the deceased was competent to dispose of the property (s. 21 (1)).

(16) Reversions *bonâ fide* acquired by purchase or mortgage for full consideration before 2 August 1894 (s. 21 (3)).

(17) The life-interest taken by a surviving husband or wife in property settled by such survivor before 2 August 1894 (s. 21 (5)).

(18) Entailed estates in Scotland, in certain cases, as more fully explained *infra* (s. 23 (14-17)).

(19) In the case of a death on or after 1 July 1896, property settled by the settlor and reverting to himself in his own lifetime (Act 1896, s. 14).

(20) In the case of such a death, property reverting to the disponent on the extinction of a life or determinable interest created by himself (Act 1896, s. 15).

(21) In the case of a husband dying on or after 1 July 1896, property of the wife (the rents of which fell under his *jus mariti*) to which she becomes entitled in virtue of her former interest (Act 1896, s. 15 (4)).

## PASSING ON THE DEATH.

The only essential relation to the deceased of the property to be taxed is that it passes on his death: not necessarily that it passes from him, either actually or constructively, as in the case of property of which he is "competent to dispose." It is held to pass when a life-interest in it ceases on the death of the deceased. Property may pass either immediately on the death or after an interval, either certainly or contingently, either originally or by way of substitutive limitation (s. 22 (1)).

## COMPETENT TO DISPOSE.

This is defined by sec. 22 (2a) to include (1) a person having such an estate or interest in property as would enable him to dispose of it; and (2) a person having such "general power" as would enable him to appoint to, or dispose of it, as he thinks fit. Property held absolutely by or for a person, or to which he has an absolute right, falls under the former head: property over which there has been conferred on him an absolute power of disposal *inter vivos* or *mortis causa* (whether he has exercised it or not) falls under the latter; and this includes money which a person has a general power to charge on property (s. 22 (2c)). But property falling under a limited power, or a power exerciseable in a fiduciary capacity, is not included.

## ENTAILED ESTATES IN SCOTLAND.

Such estates, in the hands of institutes or heirs of entail in possession, are deemed to be in the hands of a person competent to dispose of them (s. 23 (15)); and thus, on the first death after 1 August 1894 of such an heir or institute, estate duty is payable. But on subsequent deaths a distinction is drawn: if the successor be one entitled to disentail without consent, estate duty is again payable: if, on the other hand, the successor be entitled to disentail only with consent, no estate duty is due, the property being treated on the same principle as settled property; and estate duty is not again payable till the property is disentailed, or till it passes on death to an heir free to disentail without consent (s. 23 (16)).

## SETTLED PROPERTY.

Such property is neither the absolute property of the holder for the time, nor under his absolute power of disposal: but is property (or an estate or interest in it) which stands for the time being limited to or in trust for any persons by way of succession (s. 22 (1h and i), and Settled Land Act, 1882 (s. 2 (1)). On the death of the person having the terminable interest in it (liferent, annuity, etc.), it passes, but only "to the extent to which a benefit accrues or arises by the cesser of such interest"; and estate duty is payable. This includes property in which the wife or husband of the deceased takes an estate of terce or courtesy in Scotland (s. 23 (19)), or dower or curtesy in England (s. 22 (3)), but it does not include property enjoyed by a person as the holder of an office or recipient of a charitable benefit, or as a corporation sole (s. 2 (1b)), nor entailed estates in Scotland (s. 23 (14)), though, as before stated, such estates are in certain cases dealt with upon similar principles under other clauses.

## SETTLEMENT ESTATE DUTY.

This is a further or additional estate duty of 1 per cent., payable on the first occasion of estate duty being charged on settled property



Thereafter there is immunity from settlement estate duty during the further continuance of the settlement, and from estate duty and the 1 per cent. legacy and succession duties payable by lineals, until the death of one competent to dispose of the property (s. 5). Where the only life-interest after the death of the deceased is that of a wife or husband, there is an exemption from settlement estate duty, but not from estate duty. This meets the ordinary case of a settlement to protect the wife's liferent, upon whose death the property divides among the children. If the destination is to the children absolutely, no settlement estate duty is due; if there is a trust for the liferent of a child with fee to issue, the exemption does not apply *quoad* the share so settled. If there is a survivorship clause under which surviving children take absolutely upon the widow's death, it is thought that the protection of the contingent interest of survivors does not make the property "settled" within the definition of the Settled Land Act, 1882 s. 2 (1). See *Burden's Will* [1859], 28 L. J. (Ch.) 840. But it is believed a different view is taken by the Crown. See Hanson's *Death Duties*, 4th ed., p. 126.

Settlement estate duty leviable in respect of a legacy settled by the will of the deceased is now made payable out of the settled legacy, in exoneration of the rest of the estate (Act 1896, s. 19). This section overrules the decision of the Court in *Webber* [1896], 1 Ch. 914, under the principal Act, which imposed the duty in such a case on the executory estate generally, and did not give any relief against the special fund.

The amount of the *ad valorem* stamp on the settlement may be deducted when settlement estate duty comes to be paid (s. 5 (4)).

#### VALUE OF PROPERTY.

Estate duty is payable on the "principal value ascertained" as provided in the Act (ss. 1 and 7). Allowance is to be made for reasonable funeral expenses and for debts and incumbrances, but not for debts or incumbrances of the deceased, unless *bonâ fide* incurred or created for full consideration as defined in sec. 7 (1a). Debts due to creditors abroad (unless payable or charged on property in the United Kingdom) are only to be allowed out of the value of personal property situated out of the United Kingdom, in respect of which estate duty is paid. And estate duty is only repayable if it be established that the personal property abroad is insufficient to meet the debts there. Costs of administration abroad, not exceeding 5 per cent., may also be deducted, and also a foreign death duty (s. 7 (2-4)).

The leading provision is that the principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners (but subject to appeal (s. 10, and Act 1896, s. 22)), it would fetch if sold in the open market at the time of death (s. 5 (5)); subject to the proviso, in the case of agricultural property (which includes pasture, woods, cottages, farm buildings, and farm and mansion houses with grounds appropriate thereto), that where no part of the principal value is due to the expectation of increased *income* from the property, the principal value shall not exceed twenty-five years' purchase of the annual value as assessed under Sched. A of Income Tax Acts. Hence planting that enhances the amenity value in the market, but does not increase the annual *income* of the property, does not affect the value. In reaching the annual value, various deductions are to be allowed: (1) those under the Income Tax Acts, 1842 and 1853, and the Finance Act,



1894, s. 35 (*a* and *d*); (2) those under the Succession Duty Act, 1853; and (3) expenses of management, not exceeding 5 per cent.

When an estate includes "an interest in expectancy," it is provided that estate duty in respect of that interest may be paid *either* at once with the duty on the rest of the estate, *or* when the interest falls into possession (s. 7 (6)). In the latter case the value is actual and ascertained. In the former it is a matter of estimate, more or less conjectural; and as the market value is the standard, an actuarial calculation may require to be made, in which various contingencies affecting human life, *e.g.* health, climate, marriage, birth of children, etc., may require to be taken into account. See the bearing of the case *McDonalds* [1880], 7 R. (H. L.) 41, under the Entail Acts. There is also a power to commute estate duty on expectancies (s. 12), and a similar power in the Succession Duty Act, 1853, s. 41. But it must be observed that the market value not being the standard for valuing under the Succession Duty Act, the tables of that Act are not conclusive for estate duty.

As already stated, property in which the deceased had a life interest or other interest, ceasing on his death, passes, under sec. 2 (1*b*), to the extent to which a benefit accrues by the cesser; and the value of that benefit is declared by sec. 7 (7) to be, if the life interest (or other subsidiary interest) was total, the principal value of the whole property; if the life interest was partial, a proportion of the principal value corresponding to the extent of the life interest. This appears to be the meaning of this obscurely expressed clause.

There is an exception to the case of settled property being charged with estate duty on its capital value, *viz.* where the settlement, being by Statute or royal grant, no one of the persons successively in possession is capable of alienating it, *e.g.* permanent settlements or entails, as in the cases of Lord Nelson and the Duke of Wellington (s. 5 (5)). There the interest of the successor is to be taken as the property passing, and duty is to be paid on the value of such interest,—as in the case of succession duty under the Act of 1853,—not upon the capital value of the property.

#### PROPERTY SITUATED ABROAD.

(1) Heritable property situated out of the United Kingdom is not liable to estate duty. (2) Personal property so situated, where the owner was domiciled in the United Kingdom, is liable. (3) Personal property so situated, where the owner was not domiciled in the United Kingdom, is not liable. This appears to be the result of secs. 2 (2) and 6 (2) and the law applicable to legacy and succession duties therein referred to.

Where property in a foreign country (not a colony) is liable to estate duty, and is also liable to a death duty in the foreign country, the latter duty may be deducted in ascertaining the value of the property for estate duty (s. 7 (4)).

Where, again, property in a British Possession is liable to estate duty, and is also liable to a death duty in the colony, the latter duty may be deducted from the estate duty (s. 20); but only if, by an Order in Council, that section of the Act 1894 has been applied to the colony in question; and that is only to be done when *either* no colonial death duty is leviable on property situate in the United Kingdom, *or*, if leviable, the amount of the home death duty is deducted from the colonial duty on the principle of this section.

The 20th section has, by Orders in Council, been applied to the follow-

ing British Possessions or Colonies, and it is understood that they take effect from 2 August 1894:—

British India.  
New Zealand.  
Newfoundland.  
Bermudas.  
Gambia.  
Ceylon.  
Hong Kong.  
Straits Settlements.

Bahama Islands.  
Gibraltar.  
Gold Coast.  
Lagos.  
Leeward Islands.  
Natal.  
Cape of Good Hope.  
Trinidad and Tobago.

S. Australia.  
W. Australia.  
Victoria.  
Fiji.  
Falkland Islands.  
Sierra Leone.  
British Guiana.

#### PERSONS ACCOUNTABLE.

(1) The executor is accountable for estate duty on all personal property wherever situate (s. 6 (2)); and the duty accordingly falls upon the general executory estate (*Gray* [1896], 1 Ch. 620). This applies in England even in the case of a special bequest of leasehold property, which there passes to the executor (*Culverhouse* [1896], 2 Ch. 251). The executor may also pay the duty on any other property passing, which, by virtue of the will, is under his control: or, in the case of property not under his control, if requested to do so by the person accountable (s. 6 (2)). The liability is limited to the amount of assets received, or which ought to have been received, by the executor (s. 8 (3)).

Where the executor is not accountable,—

(2) Persons to whom any property passes for any beneficial interest in possession are accountable (s. 8 (4)). This includes heirs and disponees of heritable property.

(3) Trustees, guardians, etc., in whom property or its management is vested (s. 8 (4)), *e.g.* trustees of settled property. See as to Widows' Fund Trustees, *Lorimer's Act* 1896, p. 10.

(4) Alienees and purchasers (s. 8 (4)).

(5) Donees within twelve months before death (s. 2 (1c): *Foster*, [1897], 1 Ch. 484).

But an agent or bailiff for a person in the management of property is not accountable (s. 8 (4)).

Where property on which estate duty has been paid does not pass to the executor as such, it may be recovered from the owners or trustees thereof, or from a person entitled to a charge on it (ss. 9 (4) and 14 (1): *Orford's Executors* [1896], 1 Ch. 257). Persons authorised or required to pay the duty may also raise the amount by sale or mortgage of the property (s. 9 (5 and 6)). Estate duty is also a first charge on property (other than the executory estate) liable to it, but *bonâ fide* purchasers without notice are protected (s. 9 (1)).

#### AGGREGATION.

Aggregation is only of importance because the estate duty is imposed according to a graduated scale, larger estates paying duty at a higher rate. The leading provision (s. 4) is that all property passing on the death of the deceased is, for the purpose of determining the rate of duty, to be aggregated and form one estate.

There are two main exceptions to aggregation: (1) of property passing in which the deceased never had an interest (*e.g.* property settled on A. during the life of B., or an annuity provided by the deceased from a widows' fund (s. 2 (1d)); and, (2) the more usual case, of property in which the deceased had an interest (say *liferent*), passing on his death to others, by force of a disposition made by someone else: but if in that case the property passes in whole or in part to the deceased's family as described in the Act (*viz.*

wife or husband, or lineal ancestor or descendant), aggregation will take place in whole or in part.

In addition to these exceptions, it is to be observed (1) that the value of objects of national, etc. interest, given for national purposes, the duty on which the Treasury remit, is not to be aggregated (s. 15 (2)); and the same holds in regard to similar objects under private trusts which are exempted from estate duty by the Act of 1896, s. 15; also (2) that under the provisions regarding small estates, where the total estate (exclusive of settled property) does not exceed £1000, such property is not to be aggregated (s. 16 (3)).

#### GRADUATED RATES.

The graduated rates are as follows:—

WHERE THE PRINCIPAL VALUE OF THE ESTATE				RATE PER CENT.
Exceeds	£100 and does not exceed	£500		1
"	500	"	1,000	2
"	1,000	"	10,000	3
"	10,000	"	25,000	4
"	25,000	"	50,000	4½
"	50,000	"	75,000	5
"	75,000	"	100,000	5½
"	100,000	"	150,000	6
"	150,000	"	250,000	6½
"	250,000	"	500,000	7
"	500,000	"	1,000,000	7½
"	1,000,000	.	.	8

Estates not exceeding £100 are exempt from duty. For estates between £100 and £200 a fixed duty of 20s. is chargeable; between £200 and £300, a fixed duty of 30s.: and between £300 and £500, a fixed duty of 50s.—which duties are also full satisfaction for legacy or succession duty (s. 16, and Act 1896, s. 17).

#### WHEN PAYABLE—INSTALMENTS—INTEREST.

Estate duty is payable on exhibiting and recording a duly stamped inventory, or delivering an account, or on the expiry of six months after death, whichever first happens. Income down to death is included. Simple interest on estate duty is payable from death at 3 per cent. The duty on real estate may be paid by eight yearly or sixteen half-yearly instalments, the first of which is due twelve months after the death; and like interest runs on the duty from the date when the first instalment becomes due—not from death; and interest on the unpaid portion of the duty is payable with each instalment (s. 6 (4-8), and Act 1896, s. 18 (1)). Estate duty on annuities under sec. 2 (1d) are payable in four annual instalments, the first being due twelve months after death, bearing interest as above (Act 1896, s. 16).

#### APPEAL FROM COMMISSIONERS.

The decisions of the Commissioners of Inland Revenue regarding (1) repayment of excess of duty, and (2) amount of duty claimed, whether on the ground of value of property, rate of duty, or otherwise, are subject to appeal to the Court of Session as the Court of Exchequer in Scotland, from which an appeal, with leave of the Court, may be taken to the House of Lords. Where the value of the property, as alleged by the Commissioners,

does not exceed £10,000 (duty £300), the appeal may be to the Sheriff Court, from which an appeal will, it is thought, lie without leave to one or other of the Divisions of the Court of Session (s. 10, and Act 1896, s. 23).

[Hanson, *Death Duties*, 4th ed., 1897: Lorimer, *New Death Duties*, 1894, and *Death Duty Clauses*, 1896.]

See ACCOUNT DUTY: INVENTORY DUTY; LEGACY AND SUCCESSION DUTIES.

**Estates of the Realm.**—The three estates of the realm are the Lords Spiritual, the Lords Temporal, and the Commons, and they, together with the Crown, compose the Parliament of the United Kingdom of Great Britain and Ireland; the Lords Spiritual and Temporal constituting one House of Parliament, and the Commons another. In Scotland the estates composing the Parliament were thus divided, according to Sir George Mackenzie, *Institutions*, i. 3. 3:—(1) The Churchmen, consisting of the archbishops and bishops, and, before the Reformation, all abbots and mited priors. (2) The Barons, including all dukes, marquesses, earls, viscounts, lords, and the commissioners for the shires (*i.e.* the representatives sent to Parliament by the smaller barons). (3) The Commissioners of Royal Burghs. All sat together in one House.

**Eviction.**—See WARRANDICE: CROFTERS' HOLDINGS: LEASE; REMOVING.

**Evidence.**—Judicial evidence is "the proof, either written or parole, which the parties in a civil or criminal cause may legally adduce in support of the facts and circumstances on which their respective pleas or defences depend" (Bell, *Law Dict.*, *s.v.* "Evidence").

It may be noted that there are certain facts which are so notorious in themselves, or so distinctly recorded by public authority, that it is superfluous to prove them (Stephen, *Digest*, art. 58, note 26: Kirkpatrick, *Digest*, ss. 91–2). On these grounds, the judge will recognise without proof the law of the realm, written and unwritten, the ordinary course of nature, the sequence of time, the meaning of English words, and all matters which he is required by Statute so to recognise, *e.g.* public Acts of Parliament, and all Acts of Parliament passed after the year 1850, unless the contrary is expressly provided in any such Act (52 & 53 Viet. c. 63, s. 9). If the judge's memory be at fault, *e.g.* as to a date or as to the meaning of a word, he may consult an almanack (see *Goodwin*, 1837, 1 Swin. 431), or a dictionary. See JUDICIAL NOTICE.

*Instruments of Evidence.*—Evidence may be either real, or oral, or documentary.

Immediate real evidence—where the thing which is the source of the evidence is present to the senses of the tribunal—is of all proof the most satisfactory and convincing (Best, *Evidence*, s. 197). Thus where it is plainly expedient that the jury should personally inspect the lands, etc., with which the case is concerned, a motion for a view (see VIEW) will be granted (Mackay, *Manual*, 345). In the ordinary case, however, real evidence is produced through the medium of witnesses or documents (PRODUCTION). Thus, in a question as to an infringement of a patent, the parties have been ordained to allow certain skilled persons to inspect their machinery when in operation, in order that these persons might give



evidence at the trial (*Russell*, 1837, 15 S. 1270; cf. *Routledge*, 1866, 4 M. 830); and a similar course has been followed in regard to the plant, machinery, and working plans of a colliery, where the value of the deceased owner's estate was in dispute (*Bell*, 1889, 16 R. 1001; see *Jardine's Trs.*, 1864, 2 M. 1372; and cf. *D. of Buccleugh*, 1866, 4 M. 475). Further, it has been held, in a question of a collision at sea, that it was incompetent for the Court or nautical assessor to draw inferences from the real evidence afforded by the appearance of the injuries sustained by the pursuer's ship. The proper course was to have submitted for their consideration skilled evidence as to the nature and extent of the injuries, and the inferences to be drawn therefrom (*The Nerano*, 1895, 22 R. 237). And while examination of the *locus* by a judge is permissible, if made for the purpose of understanding the evidence to be afterwards led, it is not permissible if made for the purpose of criticising the evidence already led (*Hattie*, 1889, 16 R. 1128).

*Corporis inspectio* has been ordered in a question of alleged impotency (see Fraser, *H. & W.* i. 100 *et seq.*); and, in cases of rape, an inspection of the person of the party alleged to have been injured is part of the case for the Crown (see *Davidson*, 1860, 22 D. 749). So where a widow averred that she was pregnant of a posthumous child, a motion for *ventris inspectio* has been granted (*Ross*, 1669, M. 16455; see also Fraser, *P. & C.* 2; *D. de inspic. ventr.* 25. 4; Taylor, s. 554, note 2). In an action of divorce the defender tendered medical evidence to the effect that the alleged paramour was *virgo intacta*. It was rejected, on the ground that it was *ex parte* evidence, and that the Court had no power to order such an examination in the case of a person not a party to the suit (*Davidson*, *ut supra*, where the value of such evidence is discussed; see also Taylor, *Medical Jurisprudence*, 4th ed., ii. 315, 452). Where the examination was extrajudicial, the evidence was admitted (*Jobson*, 1832, 10 S. 594).

The evidence may be oral. See OATH: WITNESS.

The evidence may be documentary. It may be supplied by a formal deed, which, if probative, is complete legal evidence of the transaction set forth by it (see BLANK DEEDS; CANCELLATION; DEEDS, DELIVERY OF, EXECUTION OF; ERASURES; HOLOGRAPH WRITINGS; HOMOLOGATION; PAROLE; PRIVILEGED WRITINGS; REI INTERVENTUS; STAMPS: TESTING CLAUSE); by official writings narrating official acts (see CITATION; EXECUTION; NOTARIAL INSTRUMENT); by entries in judicial and public records (see BANKERS' BOOKS; BOOKS; COPIES AND EXTRACTS; GAZETTE: JOURNALS OF PARLIAMENT; RECORDS OF COURTS OF LAW; REGISTRATION; REGISTRY OF SHIPS; ROTULI SCOTLE: STATUTES; TRANSCRIPT); and by holograph deeds, privileged writings, letters, account books, etc. etc. (see ACCOUNTS; ADMISSIONS; BOOKS; HOLOGRAPH WRITINGS; PRIVILEGED WRITINGS).

The rules regarding the admissibility and effect of evidence are of two kinds, primary and secondary; the former relating to the *quid probandum*, the latter to the *modus probandi* (Best, ss. 111, 249).

1. *The Primary Rules* are concerned with three questions: (1) To what subjects shall the evidence be directed? (2) Upon whom rests the burden of proof? and (3) How much must be proved? (Best, ss. 111, 250).

(1) *Relevancy of Evidence*.—The first rule requires that the evidence led be alike directed and confined to the matters which are in dispute, or which form the subject of investigation (Best, s. 251). It requires, in other words, that the evidence be relevant. "The meaning of relevancy . . . imports the justice of the point that is alleged to be relevant: but under the allegiance that such points are not relevant, the meaning is, that though the points

alleged were proved, they would not justly infer the point deduced from them" (Stair, iv. 39. 12). Before a criminal case is sent to trial, the relevancy of the libel must be determined (see CRIMINAL PROSECUTION, vol. iii. p. 282); and, in considering the plea, it is not competent to look at the productions (*Paton*, 1858, 3 Irv. 208). In civil cases, the whole record, consisting of the statements of the pursuer, the statements of the defender, and the pursuer's answer, may be taken into account (*Pringle*, 1867, 5 M. (H. L.) 55, per Ld. Colonsay; Mackay, *Manual*, 223). The Court has a discretionary power to determine the objections to the relevancy before the proof is allowed. As to the elements which go to influence the exercise of that discretion, see PROOF BEFORE ANSWER.

*Relevancy of Collateral Facts.*—Facts are regarded as relevant to the facts in issue when they are connected by some general link with the latter (Stephen, *Digest*, art. 3; Taylor, ss. 316, 320 *et seq.*). Thus, in a question as to the price of one set of goods, it is competent to prove the price of another set in the same market if made by the same manufacturer, at the same time, of the same material (*Wheuller*, 1843, 5 D. 402, 1221; cf. *Gibb*, 1829, 5 Mur. 63, and *Watson*, 1839, 1 D. 1254; and contrast *Rennie*, 1822, Sh. Cr. 82, and *A. v. B.*, 1858, 20 D. 407). On the same principle, it was held, in an action of declarator to establish a servitude at the instance of an inhabitant of a royal burgh, that the possession of the other inhabitants was relevant because of the common tie which subsisted between them (*Sinclair*, 1779, M. 14519; *Thorburn*, 1841, 4 D. 169; cf. *Home*, 1846, 9 D. 286, and the cases there cited; and contrast *Mackenzie*, 1849, 12 D. 132, and *Smith*, 1879, 6 R. 858; 1880, 7 R. (H. L.) 28). On the other hand, it was held, in construing a Statute, that the proceedings upon it of persons other than the parties to the case were irrelevant, there being no privity between them (*Ewing*, 1839, Macl. & R. 435, 456). It is otherwise, however, where proof of general usage has been allowed in regard to points upon which the Statute under construction is either ambiguous (*Girdwood*, 1829, 7 S. 840; 1830, 9 S. 170), or silent (*Mays. of Dunbar*, 1835, 1 Sh. & M'L. 134, 195, 202).

It is difficult to see why, in a trial for the murder of a child having six toes on each foot, the prosecutor was allowed to ask whether any of the accused's family had an abnormal number of fingers and toes (*Laird*, 1848, Arkley, 471. Macdonald (p. 468) seems doubtful as to the competency of such evidence in any case), when, in a question of a person's sanity, evidence as to the existence of hereditary insanity in his family (*Walker*, 1807, M. App. "Proof," No. 3; 1813, 5 Pat. App. 675, where Ld. Eldon characterises the point as "very delicate": *Laing or Paterson*, 1872, 2 Coup. 222), or of the insanity of one of his relatives (*M'Leod*, 1838, 2 Swin. 88; *Gibson*, 1844, 2 Broun, 332; *Brown*, 1855, 2 Irv. 154; *Dingwall*, 1867, 5 Irv. 466; *Laing or Paterson*, *ut supra*), has been refused. Proof of the likeness between the alleged father and child has been admitted (*The Douglas Cause*, 1769, 2 Pat. App. 143, 177), and rejected (*Rutledge*, 20 Jan. 1810, F. C.). Taylor (s. 335, citing *Bayot*, 1 L. R. Ir. 308) states the English rule to be as follows: "If the point in dispute be whether a defendant was or was not in his right mind on a certain occasion, it is clear that after proof by a medical man, or (in a civil case) an admission by counsel, that madness is often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relatives had been insane would be admissible in support of the negative proposition; and on a question of disputed paternity, once prove, as a matter of science, that children are apt to inherit the features or general appearance of their parents, and then, as a matter of course,

evidence will be received of personal resemblance between the party in question and his alleged father."

It is in accordance with the rule that circumstances or statements which form part of the *res gestæ* (BEST EVIDENCE; RES GESTÆ), and statements made *de recenti*, are admissible. See also ADMISSIONS (*h*).

*Relevancy of Motive.*—In criminal cases, any facts which supply a motive for the crime (Macdonald, 469: Stephen, *Digest*, art. 7; *Rosenburg*, 1842, 1 Broun, 266: *Pritchard*, 1865, 5 Irv. 88), or constitute a preparation for it,—*e.g.* the purchase of the necessary instruments (see Dickson, s. 103),—or any conduct of the accused apparently occasioned by the commission of the crime, *e.g.* that he absconded after the crime (Stephen, *ib.*), may be proved.

*Relevancy of Explanatory or Introductory Facts.*—When the explanation of the facts in issue depends upon the ascertainment of certain other facts, proof of the latter is competent (Stephen, *Digest*, art. 9). Thus evidence as to the nature of the relations which subsisted between the parties, and of their surroundings, has been admitted in questions of donation (see DONATION), slander (*Watson*, 1890, 17 R. 404), paternity (*Lawson*, 1861, 23 D. 876: *Ross*, 1863, 1 M. 783: *M'Donald*, 1883, 11 R. 57: *Scott*, 1884, 11 R. 518: Fraser, *P. & C.* 136, and cases there cited), adultery (*Springthorpe*, 1830, 8 S. 751: *King*, 1842, 4 D. 590: *Boddy*, 30 L. J. Matr. Cas. 23: *Collins*, 1882, 9 R. 785: 1884, 11 R. (H. L.) 19: *Robertson*, 1888, 15 R. 1001: *A. v. B.*, 1896, 23 R. 588; Fraser, *H. & W.* ii. 1153: cf. *Tulloch*, 1861, 23 D. 639: *Whyte*, 1884, 11 R. 710: and see CHARACTER OF PARTIES), cruelty (*Graham*, 1878, 5 R. 1093: *Collins* and *A. v. B.*, *ut supra*), marriage (*Longworth*, 1862, 24 D. 696; 1864, 2 M. (H. L.) 49: *Robertson*, 1874, 1 R. 532: 1875, 2 R. (H. L.) 80; *Maloy*, 1885, 12 R. 431), and in reduction of testamentary writings on the ground of facility (*e.g.* *Rooney*, 1895, 22 R. 761). On the same principle, it is competent, where the question is whether a document purporting to be an ancient deed was forged, to prove what was the mode of executing deeds at the date of the deed in issue (*Humphreys*, 1839, Swin. 88-94, 119-20, *et pass.*; cf. *Lady Ivy's case*, 10 St. Tri. 615). So, too, where the mode of attesting a deed was in issue, evidence as to the mode in which other deeds by the same granter had been attested was regarded as relevant (*Morrison*, 1862, 24 D. 625, per Lord Justice-Clerk Inglis); and where an accused was charged with procuring abortion, proof was admitted that on a previous occasion he had agreed to procure abortion for another woman (*Rae*, 1888, 2 White, 62).

In deciding the question whether a testatrix intended to convey an entailed estate by her general disposition, it was held competent to consider her relation to the estate in question, the condition of the parties interested in the previous settlement of the estate, and their relation to the testatrix, and the mode in which the testatrix had dealt with the estate in other deeds, and with her general succession (*Gray*, 1878, 5 R. 820, per Ld. Pres. Inglis: see also *Furquharsons*, 1756, M. 2290: 1759, 6 Pat. App. 724: *Grant*, 1861, 23 D. 796: *Thorburn*, 1863, 1 M. 1169: *Burke & Carmichael*, 1865, 3 M. 799: *Thoms*, 1868, 6 M. 704: *Catton*, 1870, 8 M. 1049; 1872, 10 M. (H. L.) 12; *Glendonwynn*, 1870, 8 M. 1075; 1873, 11 M. (H. L.) 33; *Evans*, 1871, 9 M. 801; *Farquhar*, 1875, 3 R. 71; *Campbell*, 1878, 6 R. 310; 1880, 7 R. (H. L.) 100; *Trs. of Free Church of Scotland*, 1887, 14 R. 333). And, in determining what was a person's intention as to residence, in a question of domicile, at a given time, his acts and declarations, both before and after that time, are admissible in evidence (*Re Grove*, L. R. 40 Ch. D. 216).

*Proof of Acts of Conspirators.*—The rule finds further illustration in a



class of cases of which mobbing may be taken as an example. If it be established that the accused was one of a mob, and that what was done was done in pursuance of the mob's common purpose, it is not necessary to prove that he was the actual perpetrator. The mob's act is his act, and is relevant to the question of his guilt or innocence (Macdonald, 181 *et seq.*; Stephen, *Digest*, art. 4; Kirkpatrick, *Digest*, ss. 21, 22: ACTOR, OR ART AND PART).

*Facts similar but unconnected Irrelevant.*—Mere similarity between the facts which it is proposed to prove and the facts in issue is not sufficient to establish the relevancy of the former to the latter (Stephen, *Digest*, art. 10). Thus, in an action of damages for libel against the proprietor of a journal, it is incompetent to prove that similar libels were contained in other journals (*Leslie*, 1822, 3 Mur. 157, 181; *Aiton*, 1823, 3 Mur. 284); and, in an action of damages for rape, the averment by the pursuer that the defender had on two specified occasions attempted to ravish two other women was held to be irrelevant (*A. v. B.*, 1895, 22 R. 402). See RES INTER ALIOS; etc.: and Taylor, ss. 317 *et seq.*

*Relevancy of Malice, Intention, Knowledge.*—Where, however, a person's malice, intention, or knowledge on a certain occasion, or under certain circumstances, is in issue, proof of his conduct on similar occasions, or under similar circumstances, is relevant (Stephen, *Digest*, art. 11; *Hastie*, 1848, 11 D. 240). Thus it was regarded as relevant to a person's knowledge that a bank note was forged, to prove that he had been warned by the bank as to other forged notes (*Gibsons*, 1823, 3 Mur. 259). Where, in an action of damages for injuries from the bite of a dog, the question arises whether the owner was aware of its savage disposition, evidence of the fact that, to his knowledge, it has bitten other persons on previous occasions is relevant (*McIntyre*, 1870, 8 M. 570; *Renwick*, 1875, 2 R. 855; *Cowan*, 1877, 5 R. 241); and such knowledge by the servant who has charge of the animal (*Baldwin*, L. R. 7 Ex. 325), or by the wife (*Gladman*, 36 L. J. C. P. 153), or son (*McIntyre*, *ut supra*), has been held equivalent to knowledge by the owner. So, too, the fact that accidents have been occasioned by the dangerous character of premises may be proved where the proprietor's knowledge of the danger is in issue (*Cairns*, 1879, 6 R. 1004).

In a question whether a person did or did not intend to make a donation, it is a relevant circumstance that the alleged donor had, on a previous occasion, employed a man of business to draw, and then to alter, his settlement, and that on the occasion of the alleged gift the services of such a person were procurable, but were not procured (*Ross*, 1871, 10 M. 197: cf. *Sharp*, 1883, 10 R. 1000).

In a charge of murder, previous expressions of malice, by word or act, towards the deceased, are relevant if within a fortnight of the alleged crime (Al. i. 11: ii. 630; *Robertson*, 1842, 1 Broun. 152, 173; *Emond*, 1830, Bell's *Notes*, 289, 293; *Woods*, 1839, 2 Swin. 323. Macdonald (p. 469, note 5) disapproves of *Millar*, 1837, 1 Swin. 483, where a greater latitude was allowed). If, however, the prosecutor libel malice as commencing at a specific date, he may lead evidence regarding it subsequent, but not prior, to that date (Al. i. 11; Macdonald, 469, note 7). If he libel it generally, he may go back a considerable time (*Hume*, ii. 238; Al. ii. 630; Macdonald, 470; *Ross*, 1859, 3 Irv. 434; *Salt*, 1860, 3 Irv. 549). He may, however, prove it without libelling it, if it be made the subject of a special defence (*Wright*, 1835, 1 Swin. 6).

In cases of malice, intention, or knowledge, the connection between the two sets of facts may be too remote owing to the lapse of time (see, in addition to the cases cited in the last paragraph, *Hyslop*, 1816, 1 Mur. 15,



21; *Bannerman*, 1817, 1 Mur. 249, 252; *Gibsons*, 1823, 3 Mur. 258, 268; *Dickson & Sons*, 1830, 5 Mur. 219; see also *Dickson Bros.*, 1816, 1 Mur. 55).

*Case of a Scheme or System of Conduct.*—Where the act in issue is a part or an example of a scheme or system of which the acts which it is proposed to prove are also parts or instances, the same rule applies as in the case of malice, etc. (Stephen, *Digest*, art. 12). Thus different offences may be so related that the admission or proof of one of them will supplement the proof as to another; as, for example, when several acts of theft are committed in similar circumstances and places, and by the employment of a method, or in the execution of a scheme, of which the characteristics are found in each case (2 Hume, 385; 1 Al. 313, 314; 2 Al. 551; *Geering*, 18 L. J. M. C. 215; *Richardson*, 2 F. & F. 343; *Gray*, 4 F. & F. 1102; *Blake*, L. R. 4 C. P. D. 94; *Milne*, 1838, 1 D. 137; *Troup*, 1828, 1 D. 356; *Gellatly*, 1851, 13 D. 961).

*Case of Course of Business.*—The same principle is applicable where a regular course has been followed in the conduct of business, and the question arises whether that course was followed in a specific instance (Stephen, *Digest*, art. 13). Thus the practice of a firm in regard to the despatch of its letters (*MacKenzie*, 1861, 23 D. 1310; Taylor, s. 182), or the balancing of its books (*Maclaren*, 1862, 24 D. 577), is relevant where a question arises as to the despatch of a given letter, or as to the balancing of a given account. See PRESUMPTIONS.

As to relevancy of character, see CHARACTER: WITNESS.

See also ADMISSIONS; BEST EVIDENCE; BOOKS; OPINION EVIDENCE; RES JUDICATA.

(2) *Onus probandi*.—As to the rules which regulate the burden of proof, see AFFIRMANTI INCUMBIT PROBATIO; PRESUMPTIONS.

(3) *Substance of the Issue; Variance between Proof and Averment.*—What must be proved is the case stated upon record. This proposition does not mean that everything averred is relevant, or is a proper subject of probation (*Sooder*, 1897, 34 S. L. R. 245). It means rather that it will not do to prove a different case from that alleged; and that what must be proved is the substance of the issue, trifling divergencies between averment and proof being disregarded (Best, *Evidence*, s. 278; Dickson, s. 41).

Thus where a universal custom of trade was averred, it was held sufficient to prove general custom (*Burbidge & Co.*, 1832, 10 S. 520), but insufficient to prove one merchant's practice (*Glacervich*, 1887, 15 R. 11; see also *Jacobsen Sons & Co.*, 1894, 21 R. 654), or a common practice due to a misunderstanding of the law (*Anderson*, 1866, 4 M. 765; *Brown*, 1876, 3 R. 788; *Nisbet*, 1880, 7 R. 575; cf. *Hamilton*, L. R. 14 A. C. 221. See, however, *Tancred, Arrol, & Co.*, 1890, 17 R. (H. L.) 31, 38, per Ld. Herschell). It may be observed that comparatively slight proof of the practice of trade in Scotland will be enough to establish a rule of trade which is in full force in England (*Strong*, 1878, 5 R. 770, per Ld. Gifford; cf. *Livesey*, 1894, 21 R. 911). To make good a charge of crime arising in a civil case, the evidence must be such as would establish such a charge in a criminal Court (*Arnott*, 1872, 11 M. 62, per Ld. Neaves). A single purchase is not full proof that a man carries on the trade of a broker (*M'Mullan*, 1882, 9 R. (J. C.) 36). And where it is averred that an express warranty was granted, if it be not reduced to writing, there must be satisfactory evidence of the very words spoken (*Robeson*, 1874, 2 R. 63; *Maekie*, 1874, 2 R. 115; cf. *Rose*, 1878, 5 R. 600).

Where fraud, or malice, or the like is of the substance of the issue, it must be proved. It is otherwise where it is the legal inference from the

facts averred. Thus, in an action of reduction of a deed granted by a son in favour of his mother, it was observed that it was not sufficient for the pursuer to prove that he had transacted in ignorance of his rights, and that the consideration was grossly inadequate; he must prove deceit or unfair dealing on the part of those who took benefit from his loss (*Gray*, 1879, 7 R. 332, per *Ld. Pres. Inglis* and *Ld. Deas.* See also *Ld. Shand's* observations in the same case; and cf. *Mauvo*, 1874, 1 R. 1039). On the other hand, it is enough in an ordinary case of slander to prove that words, being in themselves defamatory and actionable, were written and spoken, without proving that they were false, or that the writer or speaker was actuated by malice (*Mackellar*, 1862, 24 D. 1124). But it is otherwise in cases of privilege (see *Denholm*, 1880, 8 R. 31; *Hussan*, 1885, 12 R. 1164; DEFAMATION). To establish a claim for damages arising from the exercise by a litigant of a right or remedy to which he is absolutely entitled without special warrant (*Wolthecker*, 1862, 1 M. 211), or from acts done by a public officer in the discharge of his duty (*Urquhart*, 1865, 3 M. 932), it must be shown that he acted maliciously and without probable cause. See *Dickson*, ss. 41-50.

The question whether the variance in any particular case is or is not substantial is to a great degree deprived of its importance by the large power of amendment created by recent Statutes (see AMENDMENT: VERDICT; *Dickson*, ss. 51-62; *Macdonald*, 499 *et seq.*).

II. *The Secondary Rules* of evidence are those which relate to the *modus probandi*; and of these by far the most important is that which requires that the best evidence be given.

*Best Evidence.*—This rule not only rejects evidence the substitutionary or secondary nature of which implies the existence of original or primary evidence, but it demands that the evidence adduced shall be proximate, and that it shall come through the proper instruments (see *Best*, s. 87 *et seq.*). It deals, accordingly, with the following matters:—Under its first branch, with hearsay evidence, evidence of the contents of documents other than the documents themselves, contradiction, modification, or explanation of writings by extrinsic evidence (BEST EVIDENCE: COPIES AND EXTRACTS: PAROLE), statements in accounts, books, etc. (ACCOUNTS; BOOKS), and depositions of dying persons (DEPOSITIONS, etc.); under its second branch, with admissions for and against interest (ADMISSIONS AND CONFESSIONS), the admissibility of a judgment or verdict in one case as evidence in another (RES JUDICATA), and the relevancy of character, etc. (see above); and, under its third branch, with the province of judge and jury in deciding upon evidence (see above).

It is to be observed, however, that the rule does not debar a man who can prove his case in more ways than one by evidence, in itself primary and admissible, from adopting whichever way he may choose, although it would be matter for observation if he adduced inferior primary evidence when better was to be had (see BEST EVIDENCE). This point is illustrated by the view which the law takes of the relative value of direct and indirect evidence.

*Direct, Indirect, and Circumstantial Evidence.*—All evidence is either direct or indirect. In other words, the *factum probandum* follows from the *factum probans*, immediately or by inference. It is matter of common knowledge that every fact or event is related to other facts or events. Every human being, for example, is so far, at all events, the creature of circumstances, that every act of his is a result produced by his will working not in isolation and independence, but as directed and conditioned by his surroundings. It is this interconnection of

facts which justifies the reception of indirect evidence. In the case of direct evidence, the sole question is whether the evidence is credible. In the case of indirect evidence, it must be established not only that the facts from which the inference is drawn are satisfactorily proved, but that the connection between these facts and the facts in issue is such as to justify the inference. Indirect or circumstantial evidence (in legal parlance, the terms are practically identical in meaning; see Best, s. 27, note) is either conclusive or presumptive. It is conclusive when the connection between the *factum probandum* and the *factum probans* is a necessary consequence of the laws of nature. It is presumptive (see PRESUMPTIONS) when that connection rests on a greater or less degree of probability (Best, ss. 27, 293). There is nothing exceptional in the character of the process of reasoning employed. It is our previous knowledge and experience of the connection which is generally found to subsist between this set of facts and that, that justifies us in inferring from the existence of the one set the existence of the other.

Direct and circumstantial evidence are "distinct modes of proof, acting as it were in parallel lines, wholly independent of each other" (Best, s. 294). Each is in its nature original evidence; each, accordingly, is admissible; and the latter is, in the eye of the law, neither inferior nor secondary to the former (*Id. ib.*).

No doubt, it may be said that direct evidence is superior to circumstantial evidence in this: that it is less exposed to the possibilities of error. In the case of the former, the sole question is whether it is to be believed; in the case of the latter, there is always the chance that the inference drawn from the *facta probata* may be erroneous. Recognition of this truth, however, need not affect our estimate of the credibility of circumstantial evidence. It should open our eyes to the necessity of care and sobriety in drawing our conclusions (Best, s. 295; Dickson, s. 95 *et seq.*). But once established, circumstantial evidence "is as satisfactory as evidence can be. A combination of coincidences all pointing, and pointing clearly, to one cause, will produce conviction on the minds of men as readily as direct evidence" (per Lord Justice-Clerk Moncreiff in his charge in the *Chantrelle* case, reported in the *Scotsman* newspaper for 11 May 1878). "It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain; but that is not so, for then, if one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together may be quite of sufficient strength" (per Pollock, C. B., in *Exall*, 4 F. & F. 922, 929). The advantages of circumstantial over direct evidence are stated by Bentham (3 Benth. Jud. Ev. 251-2) as follows: "1. By including in its composition a portion of circumstantial evidence, the aggregate mass on either side is, if mendacious, the more exposed to be disproved. Every false allegation being liable to be disproved by any such notoriously true fact as it is incompatible with, the greater the number of such distinct false facts, the more the aggregate mass of them is exposed to be disproved; for it is the property of a mass of circumstantial evidence, in proportion to the extent of it, to bring a more and more extensive assemblage of facts under the cognisance of the judge. 2. Of that additional mass of facts, thus apt to be brought upon the carpet by circumstantial evidence, parts, more or less considerable in number, will have been brought forward by so many different deposing witnesses. But the greater the number of deposing witnesses, the more seldom will it happen that any such concert, and that a successful one,



has been produced, as is necessary to give effect to a plan of mendacious testimony, in the execution of which, in the character of deposing witnesses, divers individuals are concerned. 3. When, for giving effect to a plan of mendacious deception, direct testimony is of itself, and without any aid from circumstantial evidence, regarded as sufficient: the principal contriver sees before him a comparatively extensive circle, within which he may expect to find a mendacious witness, or an assortment of mendacious witnesses, sufficient to his purpose. But where, to the success of the plan, the fabrication or destruction of an article of circumstantial evidence is necessary, the extent of his field of choice may in this way find itself obstructed by obstacles not to be surmounted."

It is beyond the scope of this article to treat in detail of the circumstances which compose this kind of proof. The subject is dealt with in Dickson, s. 65-108; Taylor, *Medical Jurisprudence*, 4th ed., i. p. 556 *et seq.*; Bentham, *Jud. Evid.* Bk. v.; Wills, *Circumst. Evidence*.

*Evidence rejected on Grounds of Public Policy.*—It is to be observed that certain evidence is rejected on grounds of public policy. Thus a witness is privileged from answering a question if the answer would expose him to a criminal charge, or would tend to show that he had committed adultery (see CROSS-EXAMINATION: WITNESS), or would operate to disclose a confidential communication (see CONFIDENTIAL COMMUNICATIONS). So, too, "it is a rule founded in decency, morality, and policy that" parents "shall not be permitted to say after marriage that they have had no connection, and therefore that the offspring is spurious, more especially the mother who is the offending party" (*Goodright*, 2 Cowp. 591, per Ld. Mansfield). Yet although their direct evidence is inadmissible to overcome the presumption of legitimacy, their statements, if made without reference to litigation, present or prospective, and, especially if made in circumstances which called for explanation, are part of the history of the case, and as such receivable (per Ld. McLaren in *Tennent*, 1890, 17 R. 1205; see Taylor, s. 950, and the cases there cited; cf. *Coles*, 1893, 22 R. 716).

The proof of the constitution and extinction of rights and obligations is in certain cases restricted to the writ or oath of the debtor or defender. This limitation is founded partly on presumptions and partly upon grounds of public policy, and is dealt with in the articles in which these rights and obligations receive treatment. Observe, that where the proof ought to have been limited when granted by the Court of first instance, but a proof at large has been taken, it must be considered (*Simpson*, 1875, 2 R. 673; *Kerr's Tr.*, 1883, 11 R. 108; *Wallace*, 1885, 12 R. 687; see also *Barr*, 1896, 23 R. 1090).

As to the sufficiency of evidence, see ADMISSIONS AND CONFESSIONS (a) (f); WITNESS.

**Ex deliberatione Dominorum Concilii.**—In old practice there were certain privileged summonses, only to be obtained on a bill passed by the Lords, and to these were adhibited the words *ex deliberatione Dominorum Concilii*. The summonses were of three classes: (1) those for which there was no accustomed style; (2) those in which the king had an interest; and (3) those in which the ordinary requisites as to citation and order of calling were craved to be dispensed with. Owing to abuses of procedure, an Act of Sederunt on 21 June 1672 determined and restricted the number and class of summonses which should be considered



privileged; and in terms of the Court of Session Act, 1850, s. 8, in no case is a bill now required for a summons. But the words *ex deliberatione Dominorum Concilii* are still subjoined to all letters passing the Royal Signet of Scotland on bills presented to the Bill Chamber of the Court of Session:—as to notes of suspension and liberation or interdict; to applications for fiats of imprisonment under 1 & 2 Vict. c. 114; and, on the rare occasions in which they are used, to bills for letters of arrestment, loosing of arrestment, inhibition, supplement, and ejection (Stair, iv. 3. 4 and 32; Bankt. iv. 27. 9; Mackay, *Manual*, 6 and 12).

See BILL: BILL CHAMBER: DILIGENCE: SUMMONS.

**Examination of Bankrupt.**—See SEQUESTRATION.

**Examination of Witness.**—See WITNESS: CROSS-EXAMINATION.

**Examination on Declaration.**—See DECLARATION BY PRISONER; CRIMINAL PROSECUTION.

**Examination, Judicial.**—Since the admission of the parties to a cause as witnesses (1853, 16 Vict. c. 20, s. 3), judicial examination has become practically unknown in Scots practice. It is, however, still competent (Shand, *Pract.* 403; Mackay, *Pract.* ii. 28 *f*; Mackay, *Manual*, 335 *g*; Dickson on *Evidence* (Grierson), ii. p. 863, note); both in the Court of Session and in inferior Courts (Dove Wilson, *Sheriff Court Pract.*, 4th ed., 263 *et seq.*). Where the statements of parties are at variance on material points of fact, the judge may ordain either of them to be judicially examined on the particular facts. Judicial examination is allowed only in cases of suspicion (Mackay, *Pract.*, *loc cit.*; *Manual*, 468 (Consistorial)). Such an examination is not given on oath. No judicial examination should be taken until the question of relevancy is disposed of (*Henderson*, 1874, 1 R. 920). Admissions made on judicial examination have not the conclusive effect of admissions on record (Dickson, *Evidence* (Grierson), s. 287). Such admissions do not seem to constitute full proof sufficient to warrant a decision without further inquiry into the facts (*Wilson*, 1831, 10 S. 110—where the examination was “before answer,” and see *Ld. Glenlee*, p. 114).

[For decisions on the subject of judicial examination, see Mackay, *Pract.* ii. 28, note *f*; *Manual*, 335, note *g*.]

See also ADMISSIONS.

**Excambion.**—Excambion is that legal contract by which lands belonging to one proprietor are exchanged for other lands belonging to a different proprietor. In its bilateral form, which is that usually adopted, it has been devised in order to save the necessity of the execution of separate conveyances by the exchanging proprietors. Excambion by separate unilateral deeds is, however, equally valid. Where the necessary judicial authority has been obtained, it is also competent for a proprietor, holding lands under entail, to excamb these, or part of them, for other lands held by him

in fee-simple, under a contract of excambion executed by himself in both capacities.

### I. IN FEE-SIMPLE PROPERTIES.

In so far as fee-simple properties are concerned, this form of contract has not (except as regards the exchange of heritable debts, and the powers conferred upon trustees under the Trusts Act of 1867, after referred to) been made the subject of any special legislative enactment. It has, however, always been accepted as a principle of law that lands acquired or disposed in excambion are subject to mutual rights of real warrandice. Such warrandice is implied in the contract, and in virtue of it either party may, in case of eviction of the lands disposed to him under the contract, recover possession of the lands given by him in exchange therefor. Further, this warrandice-right is transmitted to the heirs and singular successors of the original parties to the contract, and may be enforced even against a singular successor who acquired right prior to the eviction of the party founding on this implied warrandice. It is, however, essential, in order to exercise this right of recurrence to the original property in case of eviction, that the deed or deeds expressly bear that the lands are mutually disposed in excambion.

By sec. 150 of the Titles to Land Consolidation (Scotland) Act, 1868 (31 & 32 Vict. c. 101), which re-enacted, with certain verbal alterations, the provisions of the Titles to Land (Scotland) Act, 1860, s. 28, it is provided as follows:—

When any lands disposed before or after the commencement of this Act, under the authority of an Act of Parliament, in excambion for other lands, are burdened with debts, the lands so disposed shall, from and after the date of registration, whether before or after the commencement of this Act, in the appropriate Register of Sasines of the contract or deed of excambion of such lands, be freed and disburdened of such debts so far as previously affecting the same, and shall be burdened with the debts, if any, which previously affected the lands acquired in exchange for the same, in the order of preference in which such debts were a burden upon said last-mentioned lands: Provided always, in the case of excambions after the 31st day of December 1868, that before any such excambion is authorised (in addition to such procedure as may be prescribed by such Act) such intimation as the Court of Session may consider necessary shall be made to all creditors having interest, and such creditors shall be entitled to state any objections thereto, of which the Court shall judge: Provided also, that in such contract or deed of excambion, whether executed before or after the commencement of this Act, or in a schedule subscribed as relative thereto, and declared to be part thereof, and recorded therewith, there have been, or shall be, set forth as to each of the said debts the following particulars, namely, the amount of the debt, the date of recording the writ by which its constitution was originally published, the register in which the same was so published, the name and designation of the original creditor, and, if the debt has been transferred, the name and designation of the creditor understood to be in right thereof for the time, and the date of recording the writ whereby his right was published, and the register in which the same was so published: Provided further that in such contract or deed of excambion such debts have been or shall be expressly declared to burden the lands to which the same are transferred as aforesaid.

It will be observed that the provisions of the Act limit its application to lands disposed before or after the commencement of the Act, “under the authority of an Act of Parliament.” Its object is to facilitate excambions, where either one or both of the estates dealt with are entailed and burdened with debts, and are excambed under the provisions of the Entail Acts, or of a private Act of Parliament. This statutory provision is also applicable to lands held in trust, and excambed under any statutory authority: and,

in practice, it has likewise been held to apply to fee-simple lands where these are excambed for entailed lands.

It will also be observed that, in order to an exchange of debts in virtue of this enactment, intimation requires to be made, under the authority of the Court of Session, to all creditors having interest (in addition to any procedure prescribed by the particular Act under which it is proposed to carry through the excambion), and that such creditors may state objections thereto.

The terms of this enactment as regards exchange of debts affecting the excambed lands will also be kept in view: and it will be noted that in the contract or deed of excambion such debts must, in order to make the exchange of burdens effectual, be expressly declared to burden the lands to which they are intended to be transferred. A form of clause and relative schedule for effecting this are embraced in the form of contract appended hereto.

In the case of *Melville* (7 S. D. 889, and 8 S. D. B. 841) it was held that a verbal contract of excambion might be proved and explained by the subsequent possession of the parties. Under the Trusts (Scotland) Act, 1867 (30 & 31 Vict. c. 97, s. 3), it is made competent to the Court of Session, on the petition of the trustees under any trust deed, to grant authority to the trustees to do any of the acts therein specified, upon being satisfied that the same is expedient for the execution of the trust, and not inconsistent with the intention thereof. The acts which may be authorised include, *inter alia*, power "to excamb any part of the trust estate which is heritable." The same section also contains a provision with reference to the expenses of the application. When, however, all the beneficiaries under the trust in existence at the time are of full age and capable of acting, the Statute makes it competent for them, by deed of consent, to grant authority to the trustees to do any of the acts specified, the same not being inconsistent with the intention of the trust: and, such consent being given, it is declared to have the same force and effect as if the authority of the Court had previously been obtained. In that case, therefore, an excambion may be carried through by trustees without the sanction of the Court.

## II. IN ENTAILED ESTATES.

The provisions of the Entail Statutes with reference to excambions are, in contradistinction to the legislative provisions affecting fee-simple lands, very numerous, and they extend over the whole period of entail legislation from the Montgomery Act of 1770 to the Entail Act of 1882.

A special power to excamb lands within certain limits, or under certain conditions, or a specified portion of the estate, is also of frequent occurrence in deeds of entail. In the case of *Baird* (1844, 6 D. 643) it was held, in conformity with the opinion of the whole consulted judges, that a reserved power of this nature was not inconsistent with a strict entail under the Act 1685, c. 22, but that such power must be exercised in accordance with the express conditions under which it was given; and it was observed that, in virtue of this power, the whole entailed lands could not be sold or excambed at once. (See also *E. of Breadalbane*, 1830, 8 S. D. B. 490).

It will be convenient in dealing with this subject of excambions as applicable to lands held under entail, where the deed of entail itself contains no enabling power, and where the excambion must therefore be carried out under the provisions of the Entail Statutes, to consider it in relation to

1. *The Extent, Situation, and Value of the Lands which may be Excambed.*



2. *The Conditions under which the Excambion may be carried through.*
3. *The Form and Nature of the Procedure in the Applications to the Sheriff Court or Court of Session for the requisite Authority.*
4. *The Recording of the Contract and Completion of the Excambion.*
5. *Special Points raised under any recent Decisions.*
6. *The Form of the Contract, and Clause of Exchange of Burdens under the Titles to Land Consolidation Act, 1868, with relative Schedule.*

Reference to these points will therefore now be made in their order: and with the view of making the present position of the law more intelligible it will be necessary to trace the course of statutory legislation on the subject.

### 1. *Extent, Situation, and Value of Lands.*

By the Entailed Estates Act, 1770, 10 Geo. III. c. 51 (*The Montgomery Act*), it was provided (ss. 32 and 33) that, for the convenience and advantage of such estates, and for the improvement of the country where these were situated, by enclosing or otherwise, proprietors of entailed estates should have the power to excamb or make exchanges of land with all or every person or persons; but this privilege was limited to thirty acres Scots (equal to about thirty-seven and a half acres imperial) of arable land, or one hundred acres Scots (equal to one hundred and twenty-five acres imperial) of hill land, or other ground incapable of tillage. It was further provided (s. 33) that, for the purpose of ascertaining and adjusting the value of the lands proposed to be exchanged, an application should be made by the heir of entail to the Sheriff or Steward of the county within which the entailed estate was situated in manner therein mentioned; and upon the procedure therein specified taking place, the Sheriff was authorised to require the exchange to be made by a contract of excambion, which was declared to be effectual to all intents and purposes upon being executed and recorded in the Sheriff Court Books within three months of its date. It was further provided by this Statute (s. 33) that the lands given in exchange to the entailed estate should be held to be a part thereof, and should be subject to all the prohibitory, irritant, and resolute clauses of the entail in the same manner as if they had been originally a part of the estate, while the lands given from the entailed estate should thenceforth be held as out of the entail, and liberated from the prohibitory, irritant, and resolute clauses thereof (*McKechnie*, 1821, 1 S. 116).

By the Entail Act, 1836, 6 & 7 Will. IV. c. 42 (*The Rosebery Act*), the powers of heirs of entail as regards excambions were considerably enlarged. By sec. 3 of that Act, it was provided that, notwithstanding any prohibitory, irritant, and resolute clause contained in any entail then existing, or which might thereafter be executed, it should be lawful for the respective heirs of entail in possession of any entailed lands, and having made up a feudal title thereto, to make excambions, without the consent of any other heir, of any portion of the entailed estate for an equivalent in lands, estates, or heritages lying contiguous to the same, or to some part thereof, or being convenient to be holden therewith, and that whether the same should belong to himself in fee-simple or to any other person, and although the heritages to be given and taken in exchange might consist of different descriptions of heritable property: but this is subject to the proviso that notice of the intention to make such excambion should, three months previous to the application to the Court of Session for that purpose (as required by the said section), be given to the heirs of entail therein specified, or to their legal guardians in the case of any of them being under



any mental or other legal disability. The procedure under this form of application to the Court of Session will be referred to more fully hereafter, but it has now been superseded by the simpler forms introduced by the Rutherford Act, 1848 (11 & 12 Viet. c. 36, ss. 31–35), and the Entail Amendment Act, 1875 (38 & 39 Viet. c. 61).

By sec. 4 of the Rosebery Act it was, however, further provided, in limitation of the general powers conferred under the immediately preceding section (sec. 3), that it should not be in the power of the heir of entail to excamb the principal mansion-house or offices, nor the garden, park, lawn, home farm or policy of the entailed estate, nor more than one-fourth in value of such estate in all; and that, so soon as excambions had been made of the entailed estate to that extent, it should not be in the power of any heir of entail to make any further exchanges of any part thereof.

Sec. 5 provided that the lands and heritages received in excambion should be held to be a part of the entailed estate, and subject to all the prohibitory, irritant, and resolute clauses of the entail, while the lands given from it should be freed therefrom. It also contained stipulations to the effect (1) that no debt contracted by the heir of entail during the period between the execution of the contract of excambion and the recording of such contract in the Register of Entails should affect the lands contained in such contract, and thereby added to the entailed estate; and (2) that if, in any excambion carried out under the Act, there should be any excess of value on either side, not exceeding £200, such excess should be paid to the proprietor, whether heir of entail in possession or proprietor in fee-simple, to whom the lands of smaller value should be awarded. But if any party to an excambion should give or receive any consideration or value of any kind whatever other than the lands exchanged, or such excess as aforesaid not exceeding £200, then the excambion should be null and void.

By sec. 6 it is enacted that where any heir of entail in possession shall apply for an excambion of any part of an estate held under more than one deed of entail, but descendible to the same series of heirs, such deeds of entail shall, in reference to such application, be held and construed as one deed of entail, and the estates shall be regarded as one entailed estate.

The provisions of these earlier Statutes, which were, until the passing of the Entail Amendment Act of 1868, only applicable to old entails (that is, entails made before 1 August 1848), or to such new entails as expressly declared them to be so, were further extended by the Act 11 & 12 Viet. c. 36 (*The Rutherford Act*), sec. 5 of which provided that it should be lawful for any heir of entail of full age and in possession under an entail dated prior to 1 August 1848, with the consent of the whole heirs of entail, if less than three existed at the date of the application to the Court, or otherwise with the consent of the three nearest heirs who were for the time entitled to succeed in their order successively immediately after the heir in possession, or with the consent of the heir-apparent and of the heir or heirs, in number not less than two, including such heir-apparent, who in their order successively would be heir-apparent, to excamb the estate in whole or in part,—the authority of the Court being always obtained thereto in the manner provided by that Act; and the heir in possession was thereby further authorised to make and execute, at the sight of the Court, all contracts of excambion and other deeds necessary to give effect to such excambions.

By the Act 31 & 32 Viet. c. 84 (*The Entail Amendment Act*, 1868), further provisions affecting excambions were made. By the 14th section, the provisions of the Montgomery Act with reference to the extent and

character of the land which may be excambed, and the conditions applicable thereto, are repealed, and in lieu thereof it is enacted that not more than 300 acres of land forming part of any entailed estate, and lying together in one place or plot, shall be given in exchange, and that an equivalent in land shall be received in place thereof; while by sec. 18 the provisions of sec. 5 of the Rutherford Act, to which reference has been made, were made to apply to *all* entails, whether dated before or after 1 August 1848, as also to all lands held under trusts, of whatever date, for the purpose of being entailed. This enactment may be held to have had the effect of extending the provisions of the Montgomery Act and the Rosebery Act, so far as unrepealed, to new as well as to old entails; but it does not do so in terms, and the point, not having formed the subject of any subsequent decision, must therefore still be considered as doubtful.

It will be observed from these references to the Entail Statutes that, as regards the extent, situation, and value of lands held under entail which may be excambed, the rules now in force are as follows:—

- (a) With the necessary consent or consents, the whole or any part of the entailed estate, whether held under an entail dated prior or subsequent to 1 August 1848, may be excambed.—Rutherford Act, 1848, s. 5; Entail Amendment Act, 1868, s. 18.
- (b) Without such consent, any portion thereof may be excambed for other lands lying contiguous to the same, or to some other part of the entailed estate, or being convenient to be holden therewith; but this must not include the principal mansion-house or offices, or the garden, park, lawn, home farm, or policy, nor extend to more than one-fourth in value of the entailed estate; and where one-fourth in value of the whole estate has been excambed under the authority of this Act, no further excambions are competent.—Rosebery Act, 1836, ss. 3 and 4.
- (c) Without such consent, any portion of an entailed estate, not exceeding 300 acres lying together in one place, may be given in exchange for an equivalent in land, to be received in place of the land given in exchange. There is, under the provisions of the 1868 Act, no restriction as to the quality or character, or the precise situation or value, of the land which may be made the subject of the excambion; but it will be kept in view that this is really an extension of the powers of the Montgomery Act.—Entail Amendment Act, 1868, s. 14. See also case of *Hamilton*, 1833, 12 S. 22, as to the validity of an excambion of the surface merely, the minerals being reserved, and *Duke of Hamilton*, 1838, 20 D. 1134, as to considerations to be taken into account in estimating the value of entailed lands to be excambed.

## 2. *Conditions under which Excambions may be carried through, other than those relative to the Extent, Situation, and Value of the Lands.*

Reference has already been made, under the preceding head, to the terms of the Rosebery Act as to (a) the legal effect of an excambion as regards the lands given and received respectively; (b) the conditions as to title under which these excambed lands are in future to be held; (c) the provision under which any excess in value not exceeding £200 is to be dealt with; and (d) the case of lands held under more than one deed of entail, but descendible to the same series of heirs. Except, however, as to these conditions the other provisions of the Montgomery Act (ss. 32 and 33) were thereby declared to remain in force; but these latter provisions have

since been partly repealed by the Entail Amendment Act of 1868 (s. 14), as above mentioned, while those relating to procedure have been modified by the terms of the Rutherford Act and the Entail Amendment Act of 1875.

After the Rosebery Act, the first Statute which requires to be noticed is the Entail Act of 1841 (4 & 5 Vict. c. 24), which provides (s. 1) that it shall not be necessary to insert in any contract of excambion executed under the authority of the Rosebery Act, the whole destination of heirs-substitute and successors, or the conditions and provisions and prohibitory, irritant, and resolute clauses of the original entail, provided that reference is made in the contract to such original entail, and that it sets forth the date thereof, and the date of recording in the Register of Entails. This Act was passed to remove doubts as to whether it was necessary to insert the destination, conditions, etc.: and although not in terms retrospective, it would probably be held to be so. In point of fact, the destination and conditions were not, as a rule, inserted: and, in practice, contracts so framed are accepted as sufficient. The provisions of this Statute were further extended by the 27th section of the Titles to Land Act, 1860 (re-enacted in sec. 9 of the Titles to Land Consolidation Act, 1868), by which it was provided that the reference may be made to the deed of entail, as recorded in the Register of Entails, if the same shall have been so recorded, or to any conveyance or deed recorded in the appropriate Register of Sasines, and forming part of the progress of title deeds following on the entail,—such reference being made in terms of Schedule C, appended to the Consolidation Act.

It was also enacted by sec. 1 of the Act of 1841, that it should be incumbent on the Keeper of the Register of Entails to record contracts of excambion therein, upon the same being presented to him, without the necessity of a warrant from the Court of Session for that purpose.

Reference has already been made to the terms of sec. 5 of the Rutherford Act, under which the heir of entail in possession might excamb the whole or any part of the entailed estate upon obtaining the consent of the subsequent heirs of entail specified in that section, and the authority of the Court of Session to the excambion: but the provisions of that Act were very considerably modified by the Entail Amendment Act, 1875, ss. 5 and 6. The first of these sections provided that, in any application to the Court of Session for authority to disentail an entailed estate held under an entail dated prior to 1 August 1848, the consent of any heirs of entail whose consent was required in terms of the Rutherford Act might competently be given after such application had been presented to the Court, or in the course of the proceedings to follow thereon: and, further, that in the event of any of the said heirs, except the nearest heir for the time, whether an heir-apparent or not, declining or refusing to give, or being legally incapable of giving, his consent, the Court might dispense with such consent in terms of the provisions thereafter set forth. These provisions or regulations provide for the Court's ascertaining the value in money of the expectancy or interest in the entailed estate of the heir or heirs declining, or refusing, or incapacitated to give his or their consent, for the consignation thereof in bank, or security therefor being given over the entailed estate, and for the Court's dispensing with the consent or consents of the heir or heirs the value of whose expectancy or interest has thus been ascertained; and the Court was thereupon authorised to proceed as if such consent or consents had been obtained; but it was provided that nothing contained in the Act should render it competent to dispense with the consent of the nearest heir for the time entitled to



succeed to any entailed estate sought to be disentailed. Sec. 6 makes the provisions of the preceding section applicable also *inter alia* to the case of an heir of entail applying for power to excamb such estate in whole or in part; and this section further provides that nothing contained in the Act should render it necessary to obtain the consent (or the dispensing with the consent) of any heir of entail whose consent would not have been necessary before the passing of the Act.

These provisions of the Acts of 1848 and 1875 were further amended by the Entail (Scotland) Act, 1882 (s. 13), which made the provisions of sec. 5 of the Act of 1875 applicable also to the consent of the heir-apparent or other nearest heir, where the consent of such heir is required in any application under the Entail Acts, so that the value in money of the expectancy or interest of such heir may now be ascertained in the same manner as is provided by the Act of 1875 with reference to the remoter heirs, and the amount thereof consigned in bank, and the consent of such nearest heir dispensed with by the Court in the same manner as was previously competent in the case of the remoter heirs. This section also provides for the case of the application being opposed by any creditor of such heir who shall prove that, prior to the passing of the Act, he had lent money to such heir on the security of his right of succession to or interest in the entailed estate, or by the wife or children of such heir in whose favour he shall have granted provisions under the Entail Acts; but the proviso appears to be more applicable to petitions for authority to disentail or to charge with debt or incumbrances, or for an order of sale, than to an application for power to excamb lands, and its terms need not therefore be referred to at further length here.

The Act of 1882 also provided (s. 12) for such consent being given in the case of any heir under age, or subject to other legal incapacity, by a curator *ad litem* to be appointed to him by the Court: and the Act declares that no curator *ad litem*, who may give any consent in virtue of it, shall incur any responsibility on account of such consent, in respect of any error in judgment or inadequacy of consideration or want of consideration therefor, unless it shall be alleged and proved that he acted corruptly in the matter.

Another enactment which requires to be noticed under the head of "Conditions of the Excambion" is contained in sec. 37 of the Rutherford Act. Secs. 33 to 36 inclusive of that Act relate to procedure in applications to the Court presented under that Act, and their terms will be noticed hereafter under the third head of the present article. Sec. 37, however, deals specially with excambions falling under the Rosebery Act, and provides that from and after the passing of the Act it shall not be necessary for any heir of entail in possession, intending to effect an excambion under the Rosebery Act, to adopt any of the procedure thereby required: but it shall be competent to such heir of entail to present an application to the Court, by way of summary petition, in the form and manner prescribed by the Rutherford Act. This section also enacts that it shall not be necessary to record any contract of excambion executed at the sight of the Court, as required by the Rosebery Act, in any other register than the Register of Entails.

The next Statute to which reference should, in this connection, be made, is the Entail Amendment Act, 1853 (16 & 17 Vict. c. 94), which provides, in sec. 5, that it shall be lawful for any heir of entail who is or shall be in a position *inter alia* to excamb his entailed estate in whole or in part under the provisions of the Rutherford Act, to execute, without the previous sanction



of the Court, a contract of excambion or other deed for giving effect to such excambion, and to produce such executed deed either along with the application to the Court for its sanction thereto, or in the course of the proceedings to follow under such application. This section also contains additional provisions relative to the Court's approval of such deed, which it is unnecessary to notice here in further detail.

Sec. 11 of the same Act, which has been repealed by the Statute Law Revision Act of 1875, provided *inter alia* that in all contracts of excambion which might be made and executed in virtue of the Rutherford Act, and in all instruments of sasine following thereon, it should be competent to omit the insertion of the destination, and of the conditions and provisions, and prohibitory, irritant, and resolute clauses contained in the original entail, provided that reference were made thereto in terms of the section under recital. This enactment was, however, unnecessary from the first, in view of the provisions of the anterior Act of 1841, which have already been noticed.

Any other provisions of the Entail Statutes which may be considered as falling under this head will be dealt with under the succeeding head of "Procedure," but meantime it will be observed that the following conditions are, in addition to those already referred to in the introduction to this section, still applicable to all excambions carried out under the Entail Statutes:—

- (a) The destination, conditions, and prohibitory, irritant, and resolute clauses of the entail may now be incorporated in the contract, by the original deed of entail, the date thereof, and the date of recording in the Register of Entails being set forth in a clause of reference, or by such reference being made to the deed of entail, or to any conveyance, instrument, or other writ recorded in the Register of Sasines, and forming part of the progress of title deeds following on the entail.—Entail Act, 1841, s. 1, and Titles Act, 1860, s. 27, as re-enacted by Titles Consolidation Act, 1868, s. 9.
- (b) The contract may be recorded without the necessity of a warrant from the Court of Session, but the authority of the Court to the excambion itself is still required.—Entail Act, 1841, s. 1.
- (c) The contract may be executed prior to the application being made to the Court, and may be produced in the course of the proceedings.—Entail Act, 1853, s. 5.
- (d) Where the consent of subsequent heirs of entail, including the heir-apparent or other nearest heir, is required, the value of such consent may be ascertained, the amount thereof consigned in bank, and the consent dispensed with by the Court.—Entail Act of 1875, ss. 5 and 6, as amended by Entail Act of 1882, s. 13.
- (e) Such consent may also be given by a curator *ad litem* appointed by the Court to any heir of entail in minority or under other legal disability.—Entail Act, 1882, s. 12.
- (f) Where an excambion is to be carried out under the Rosebery Act, the application to the Court may be made by way of summary petition in the form and manner prescribed by the Rutherford Act, as amended by the Entail Act of 1875, and it is now unnecessary to adopt any of the procedure required by the Rosebery Act.—Entail Act, 1848, s. 37.

(g) It is now sufficient to record any contract of excambion, executed at the sight of the Court, in the Register of Entails.—Entail Act, 1848, s. 37.

### 3. *Procedure in Petitions.*

Reference has already been made to the terms of sec. 33 of the Montgomery Act (10 Geo. III. c. 51), by which it was provided that upon the application to the Sheriff or Steward before referred to being presented, he should appoint two or more skilful persons to inspect and adjust the value of the lands proposed to be excambed: and upon such persons settling the marches of these lands, and reporting upon oath that the exchange would be just and equal, the Sheriff or Steward might authorise the exchange to be made by a contract of excambion as before mentioned.

By the Rosebery Act (6 & 7 Will. IV. c. 42), s. 3, provision was made for proceeding by summary petition to the Court of Session after three months' previous notice to the five next heirs of entail, or the whole heirs of entail if their number should be less than five (or, *inter alios*, to their legal guardians if an heir or heirs should be under any mental or other legal disability), and the Court were authorised, after proof of this notice having been given and upon receiving a report from two or more skilful persons as to the value and marches of the lands proposed to be excambed, and upon being satisfied of the respective values of such lands and of the expediency of the excambion, to give and authorise the same; and thereupon the contract of excambion was directed to be executed at the sight and with the approbation of the Court, and recorded in the Sheriff Court Books of each of the shires or stewartry in which the lands or heritages to be excambed were situated, and also, within three months, in the Register of Entails.

By the Rutherford Act (11 & 12 Viet. c. 36), ss. 33 to 37, the forms of procedure previously in use were modified, and it was enacted that it should be lawful for any heir of entail desiring to take advantage of any of the provisions of that Act, as to which the authority was by that Act required, to make application by way of summary petition to the Court of Session, and such petition should set forth the deed of entail under which the estate was held, the date of the petitioner's infetment therein, and the names, designations, and places of abode, so far as known to the petitioner, of the heirs-substitute whose consents were required to such petition (or, if under legal disability, then of their tutors or other legal guardians), as also the extent and manner in which such estate was proposed to be affected. [*Note*.—As to the necessity for setting forth date of infetment of heir of entail in petition for authority to excamb, see *Lord Wharnclyffe*, 1852, 24 Sc. Jur. 553, 1 Stuart, M. & P. 948, and *MacLaine*, 1852, 24 Jur. 545. See also the case of *Sir John Marjoribanks*, 1852, 14 D. 935, as to the necessity for setting forth fact of entailed estates being situated in two separate counties.] Sec. 34 relates to the intimation and advertising of the petition, but it has been partially repealed and virtually superseded by the provisions of the Entail Amendment Act of 1875. Sec. 35 authorises the Court to interpose their authority, and give decree authorising the petitioner to do and perform the act or acts proposed in the petition, in so far as authorised by the Statute. Sec. 36, to which reference has been made, deals with the heirs of entail who require to be called as parties to the proceedings: while sec. 37, which relates to excambions carried through under the Rosebery Act, and the recording of any contracts executed at the sight of the Court, has also been previously referred to.

- (a) The provisions, therefore, as to procedure which are now in force are those contained in the above-recited sections of the Rutherford Act as modified by the provisions of sec. 12 of the Entail Amendment Act, 1875, and the Clerks Regulation Act, 1889. These latter provisions are, however, applicable to all petitions to the Court under the Entail Statutes, and accordingly they need not be further dealt with under this article. The only exception, apparently, was that an application for authority to excamb might formerly, in contradistinction to one to disentail, sell, alienate, dispone, or charge with debt or incumbrances, have been made and prosecuted by the tutor or curator of a pupil or minor heir, or one under legal incapacity (see sec. 12 of Entail Amendment Act, 1875). But this enabling power in favour of a tutor or other legal guardian has now been extended by sec. 11 of the Entail Act of 1882 to all applications under the Entail Statutes, except one for authority to disentail. Sec. 15 of that Act also makes certain special provisions with reference to the consent of an heir who is absent from Scotland or has disappeared.
- (b) Sec. 12 of the Entail Act of 1882, under which the consent of any subsequent heir under legal disability may be given through the medium of a curator *ad litem* appointed by the Court to such heir, is also an important change in procedure introduced by that Act. Sec. 5 of the same Statute authorises applications for authority to charge for improvement expenditure or to grant leases being made in the Sheriff Court; but apparently if that Court is now resorted to in any application to excamb lands, that would require to be done, so far as procedure is concerned, under the provisions of the Montgomery Act (*q.v.*).

#### 4. *The Completion of the Contract by the recording of it in the appropriate Register or Registers.*

As has been already pointed out, the Montgomery Act required the contract to be recorded in the Sheriff Court Books within three months of the date of its execution, the excambion having previously been authorised by the Sheriff, but under this Act it was not necessary that the contract itself should be executed at the sight and with the approval of the Sheriff. The Rosebery Act, by which application to the Court of Session was first made competent, required the contract to be executed at the sight of the Court, and provided that thereafter it should be recorded in the Sheriff Court Books of the county in which the excambled lands were situated, and also, within three months, in the Register of Entails. The provisions of the Rosebery Act were, however, only applicable to heirs of entail in possession under tailzies made and executed pursuant to the Tailzies Act, 1685; and accordingly the Entail Act, 1838 (1 & 2 Vict. c. 70), was passed, by which the powers of the Rosebery Act as to making excambions were extended to heirs in possession of entailed estates under deeds of entail which had not been recorded in terms of the Act of 1685. This Act further provided that all contracts of excambion to be executed in virtue thereof should be recorded in the Sheriff Court Books of each of the shires or stewartries in which the excambled lands were situated, and should thereupon be effectual to all intents and purposes, without the necessity of being recorded in the Register of Entails. It further enacted that, in the event of any deed of entail being recorded in the Register of Entails, *after* an excambion had taken



place, it should be incumbent upon the person registering the entail to record at the same time in that register any contract or contracts of excambion of any part or parts of the entailed estate which had been entered into before registration of the deed of entail, and that, failing the registration of such contracts, the deed of entail, in so far as regarded any excambion carried through before the registration, should be deemed and taken to be unrecorded in the Register of Entails. This Act of 1838 was supplemented by the Entail Act, 1841 (4 & 5 Vict. c. 24), previously referred to, under which the contract might be recorded in the Register of Entails without judicial warrant; and the final statutory provision on the subject is contained in the 37th section of the Rutherfurd Act, by which it was made unnecessary to record any contract of excambion executed at the sight and with the approval of the Court in terms of the Rosebery Act, as amended by the Rutherfurd Act, in any other register than the Register of Entails. This, therefore, is now the ruling provision on the subject, except where it is desired to carry through an excambion under the Montgomery Act, or in virtue of the Act of 1838 dealing with unrecorded entails, in which cases the proper and competent course is still, apparently, to record the contract in the Sheriff Court Books of the appropriate county or counties.

As to the recording of a contract of excambion affecting an entailed estate lying in two separate counties, see *Oswald*, 1848, 10 D. 678.

#### 5. *Special Points raised under recent Decisions.*

The only recent decisions affecting the law of excambion are the cases of *Roxburgh*, 1877, 4 R. (H. L.) 76, and *Stewart*, 1877, 4 R. 981, which are both of a peculiarly special and technical interest.

In the case of *Roxburgh*, where the original parish church—in a parish from which a part had been disjoined and erected into a parish *quoad sacra*—was excambied for a new church voluntarily erected by one of the heritors, who was a fee-simple proprietor, it was held by the House of Lords, reversing the judgment of the Court of Session, that, in the absence of stipulation in the contract of excambion, the sittings fell to be allocated as in the old church.

In the case of *Stewart* an heir of entail in possession obtained power to feu a part of the entailed estate in terms of a form of feu-charter approved by the Court, whereby the feuars were taken bound to “take and pay for,” by way of annual assessment, a water supply provided from another portion of the entailed estate not within the limits of the feuing-ground. The feuing-ground was afterwards excambied for other lands held by the heir of entail in fee-simple, and thus became vested in the heir of entail as a fee-simple proprietor. In a question between a succeeding heir of entail and the successor in the fee-simple estate of superiority of the feus, it was held (1) that the feu-charters granted before the excambion had created servitudes of *aqueductus* over the entailed estate, in return for annual payments, which were due to the heir of entail in possession as owner of the servient tenement, and not to the superior of the feus; and (2) that feu-charters granted after the excambion were ineffectual to create such servitude.

#### 6. *Reference to Form of Contract and General Observations.*

A form of contract applicable to an excambion of part of an entailed estate under the authority of the Court, and containing a clause of exchange



of burdens under the provisions of sec. 150 of the Titles to Land Consolidation Act, 1868, is appended.

In view of the scattered nature of the statutory provisions relating to the right of excambion in entailed lands, and the lengthened period over which they extend, some codification of the law seems desirable, and the only other general observations which may, in conclusion, be made are—

1. That the principle of excambion involves a “fair equivalent” to be given in exchange, and that in the case of entailed lands—where a statutory responsibility has been laid upon them by the Legislature—the Court regard it as their duty to see that such fair equivalent is given to the entailed estate for the lands taken from it.

2. In the case where an heir of entail may have to complete a title by special service as heir to a deceased proprietor under entail, in lands which have been added to the entailed estate by an excambion under the Entail Statutes, it has been suggested (Prof. Bell's *Lectures on Conveyancing*, p. 1095) that the destination and conditions of the entail ought to be inserted or referred to in the service in the same manner as if the lands had been originally contained in the deed of entail itself, and that it is insufficient to refer to the destination and conditions as these are contained or set forth in the contract of excambion, or in any instrument of sasine following thereon. This view appears to be sound, but the reference may now be made in accordance with the provisions of sec. 9 of the Titles Consolidation Act, 1868, before mentioned.

FORM OF CONTRACT OF EXCAMBION APPLICABLE TO ENTAILED AND FEE-SIMPLE LANDS, WITH CLAUSE FOR EXCHANGE OF HERITABLE DEBTS, UNDER TITLES CONSOLIDATION ACT, 1868, AND RELATIVE FORMS OF SCHEDULES.

It is contracted and agreed between the parties following, namely, A., heir of entail in possession of the lands and estate of X. and others after mentioned, on the one part, and the said A., as fee-simple proprietor of the lands of Y. and others after mentioned, on the other part,—to the effect underwritten: Considering that I, the said A., as heir of entail foresaid, on or about the \_\_\_\_\_ day of \_\_\_\_\_ presented a petition to the Lords of Council and Session, First Division, Junior Lord Ordinary, Mr. \_\_\_\_\_, clerk, setting forth *inter alia* that I was heir of entail in possession of the entailed lands and estate of X., lying in the parishes of \_\_\_\_\_ and county of \_\_\_\_\_, under a strict entail constituted by [here narrate the deed or deeds of entail under which the lands are held], and that I had made up titles to the said entailed lands and estates as nearest and lawful heir of tailzie and provision to \_\_\_\_\_ under the said entail, conform to the several writs [or as the case may be] therein particularly set forth, and duly recorded in the appropriate division of the General Register of Sasines: That I, with the view of carrying through an excambion of the parts therein and hereinafter mentioned of the said entailed lands and estate for certain other lands belonging to me in fee-simple, also therein and hereinafter mentioned, was desirous of availing myself of the provisions of the following Statutes [here set forth the particular Statutes on which the application was founded, with the sections thereof] and relative Acts of Sederunt: That I was also proprietor in fee-simple of the lands of Y. after mentioned, which were held by me under [state title shortly], and were surrounded entirely on three sides, or lay contiguous to [or as the case may be] the said entailed lands and estate, and from their situation and other circumstances mentioned in the said petition it was of importance to the said entailed estate, and to the heirs of entail succeeding thereto, that the said lands of Y. should be added to the said entailed estate; and that the annual value of the lands so proposed to be added to the entailed estate was £ \_\_\_\_\_ or thereby: That I was accordingly desirous to make an excambion whereby the said lands of Y. should be incorporated with the said entailed estate under the entail thereof in time coming, and certain parts of a corresponding value of the lands and estate possessed by me under the said entail, which could be held apart therefrom, should be given in exchange for the said lands of Y.: That the said entailed lands and estate belonging to me as heir of entail foresaid com-

prehended *inter alia* the following lands [*mention these shortly by their leading names, but without describing them*], which were detached from the remainder of the said entailed lands and estate, and were unsuitable to be possessed in connection therewith, and that I was therefore desirous that the said lands last above mentioned [*add, if this be desired, "under reservation to me, as heir of entail foresaid, and my heirs and successors in the said entailed estate, of the whole mines and minerals in the said lands"*] should be excambed for the said lands of Y. belonging to me in fee-simple as aforesaid, in virtue and in terms of the provisions of the several Statutes before referred to, and that I accordingly made the said application for the purpose of obtaining their Lordships' authority to that effect: That the annual value of the said lands proposed to be taken from the said entailed estate in exchange for the said lands of Y. was £                    sterling or thereby, and was accordingly equivalent in amount to the annual value of the said lands of Y. [*or otherwise, as the case may be. If there be a difference in value, the capitalised amount thereof will be set forth as part of the consideration for the excambion, but in the case of entailed lands this must not exceed £200*]: That any lands already excambed from the said entailed estate since the date of the entail thereof, with the portion now proposed to be excambed, were within one-fourth in value of the said entailed estate: That the said portion of my entailed estate proposed to be excambed as aforesaid did not include the mansion house, offices, garden, park, lawn, home farm or policy of the said entailed estate, or any part thereof: That the said fee-simple lands of Y. and the said entailed estate were severally burdened with debts, and that I was desirous that, in terms of the 150th section of the Titles to Land Consolidation (Scotland) Act, 1868, the lands respectively disposed by the contract of excambion to be executed by the authority of their Lordships should be severally freed and disburdened of the debts then affecting the same, and should be severally burdened with the debts which then affected the lands to be exchanged therefor respectively, in the order of preference in which such debts were then burdens upon such last-mentioned lands: That I was of full age, and that the three nearest heirs entitled to succeed to the said entailed lands and estate immediately after me in their order successively were [*here give the names and designations of the three subsequent heirs of entail, and state whether they are all of full age or in pupilarity*], and which petition *inter alia* prayed their Lordships, after the usual intimation, advertisement, and service, to ordain the said [*names of heirs of entail*] to lodge answers thereto if so advised, and thereafter, on resuming consideration thereof, with or without answers, and upon such inquiry into the facts therein set forth as their Lordships should judge necessary for ascertaining the expediency of the proposed excambion and the relative value of the lands proposed to be excambed, and on being satisfied with the expediency of the said excambion and that the procedure under the said application was in conformity with the foresaid Statutes and relative Acts of Sederunt, to interpose authority to the proposed transaction; to pronounce judgment and decree authorising me, as heir of entail foresaid, to excamb the foresaid portions of the said entailed lands and estate of X. for the foresaid lands of Y. belonging to me in fee-simple as aforesaid; and to appoint the requisite contract or other deed of excambion to be prepared and executed in common form at the sight and with the approbation of their Lordships; and upon the said contract or other deed of excambion being lodged in process duly executed, to approve thereof and to grant warrant to and ordain the same to be recorded in the Register of Tailzies: And, further, considering [*here set forth the intimation, advertisement, and service of the petition and procedure thereunder in usual form, including remits to professional and skilled reporters*]; . . . and the draft of these presents having been revised and adjusted by the said                   , and the said                    having reported in favour of the proposed excambion, and the said report and draft contract of excambion having been lodged in process, Lord                   , Junior Lord Ordinary, upon the                    day of                    pronounced the interlocutor, of which the following is a copy [*take in interlocutor verbatim*]: Therefore, in pursuance of and under the authority of the said Acts of Parliament, and as duly authorised by the said Lords of Council and Session as above set forth, I, the said A., as entailed proprietor of the said lands and estate of X. in consideration of the lands of Y. to be disposed by me to myself and the heirs of entail succeeding to me in the aforesaid lands and estate of X. in manner after mentioned, have sold, alienated, and disposed, as I do hereby sell, alienate, and dispose, from me and the said heirs of entail succeeding to me in the said entailed estate of X., to and in favour of myself and my heirs and assignees whomsoever, heritably and irredeemably, All and Whole the following parts and portions of the said entailed lands and estate of X., namely [*take in description of lands, with reservation of mines and minerals, and liberty to work the same if this be desired. A plan of the lands mutually disposed may also be referred to if thought necessary*]; together with my whole right, title, and interest, present and future, in the said lands and others before disposed: In consideration whereof, and on

the other part, I, the said A., as fee-simple or unlimited proprietor foresaid, do hereby sell, alienate, and dispone from me, my heirs and successors, to and in favour of myself, the said A., and the heirs-male of my body [or otherwise], whom failing [insert destination in entail, so far as necessary] whom failing, the other heirs appointed to succeed to the said entailed lands and estate of X., in terms of the destination contained in the aforesaid deed of entail thereof granted by \_\_\_\_\_, and dated and recorded as aforesaid, heritably and irredeemably All and Whole [here describe fee-simple lands in same way as before indicated]; together with my whole right, title, and interest, present and future, in the said lands of Y. immediately hereinbefore disposed; but declaring always, as it is hereby expressly provided and declared, that the said lands of Y. are disposed with and under the whole reservations, conditions, and provisions, restrictions, limitations, exceptions, clauses prohibitory, irritant, and resolute, declarations, powers, faculties, and others [and clause authorising registration thereof in the Register of Tailzies, if this be in the deed] specified and contained in the said deed of entail dated \_\_\_\_\_ and recorded \_\_\_\_\_ [state here Registration both in Register of Entails and Register of Sasines, and also in the Books of Council and Session, if deed so recorded] made and granted by the said \_\_\_\_\_ and which reservations, conditions, provisions, restrictions, limitations, exceptions; clauses prohibitory, irritant, and resolute, declarations, powers, faculties, and others [and clause authorising registration, etc., if in the original deed] are hereby declared to be applicable, and are hereby applied to the said lands of Y. hereinbefore disposed, along with the said entailed lands and estate of X. as originally entailed, and that in the same manner, and to the same effect, and with the same force against myself and the said succeeding heirs of entail, and the said lands of Y. hereinbefore disposed, as if the said last-mentioned lands had been contained in the said original deed of entail, dated and recorded as aforesaid, and had been conveyed by the said deed along with the said entailed estate of X., and originally formed part thereof: And it is hereby specially provided and declared, in terms of the said 150th section of the Titles to Land Consolidation (Scotland) Act, 1868, that All and Whole the foresaid parts and portions of the foresaid entailed lands and estate of X. hereinbefore disposed to myself, the said A., and my heirs and assignees whomsoever, shall from and after the date of registration of these presents in the division of the General Register of Sasines applicable to the county of \_\_\_\_\_, be freed and disburdened of the debts so far as previously affecting the same, the particulars whereof, as required by the said Act, are set forth in the Schedule Number I. annexed and subscribed as relative hereto, and which Schedule Number I. is hereby declared to be part hereof and is appointed to be recorded herewith; and that the said parts and portions of the said entailed lands and estate of X. before disposed as aforesaid shall from and after the date of registration of these presents as aforesaid be burdened with the debts which previously affected the said fee-simple lands of Y. acquired in excambion therefor under these presents, in the order of preference in which such debts were a burden upon the said lands of Y., and the particulars of which last-mentioned debts are set forth in the Schedule Number II. annexed and subscribed as relative hereto, and which Schedule Number II. is hereby declared to be part hereof and is appointed to be recorded herewith: And the said last-mentioned debts are hereby expressly declared to burden the said parts and portions of the said entailed lands and estate of X. before disposed as aforesaid accordingly: And, further, that All and Whole the said lands of Y. before disposed to myself as entail proprietor foresaid, and the heirs of entail succeeding to me as aforesaid, shall from and after the date of registration of these presents as aforesaid, be freed and disburdened of the debts so far as previously affecting the same, the particulars whereof, as required by the said Act, are set forth in the foresaid Schedule Number II.; and that the said lands of Y. before disposed as aforesaid shall from and after the date of registration of these presents as aforesaid be burdened with the debts which previously affected the said parts and portions of the said entailed lands and estate of X. acquired in exchange therefor in the order of preference in which such debts were a burden upon the said parts and portions of the said entailed lands and estate of X., the particulars of which last-mentioned debts, as required by the said Act, are set forth in the foresaid Schedule Number I.; And the said last-mentioned debts are hereby expressly declared to burden the said lands of Y. before disposed as aforesaid accordingly: With entry to the respective lands and others hereinbefore disposed as at the date hereof; and I, as fee-simple or unlimited proprietor and also as heir of entail foresaid, and without prejudice to the real warrandice implied in law, bind and oblige myself and my respective heirs foresaid reciprocally to warrant the lands and others severally above disposed, with the writs and this present right and disposition of the same and infeftment to follow hereon, to be good, valid, and sufficient at all hands as law will: And I reciprocally assign the rents; And I reciprocally grant warrandice thereof from fact and deed; And I consent to the registration hereof in the



Register of Tailzies, and also to registration for preservation and execution.—In witness whereof.

## SCHEDULE NUMBER I.

Amount of the debt.	Writ constituting the debt.	Date of recording of writ by which constitution originally published.	The register in which the same was so published.	The name and designation of the original creditor.	Where the debt has been transferred, the name and designation of the creditor understood to be in right thereof.	The date of recording the writ whereby the assignee's right was published.	The register in which the same was so published.

## SCHEDULE NUMBER II.

Amount of the debt.	Writ constituting the debt.	Date of recording of writ by which constitution originally published.	The register in which the same was so published.	The name and designation of the original creditor.	Where the debt has been transferred, the name and designation of the creditor understood to be in right thereof.	The date of recording the writ whereby the assignee's right was published.	The register in which the same was so published.

**Ex capite lecti.**—See DEATHBED.

**Exceptio.**—In Roman law, where the defender met the pursuer's demand, not by denying it or objecting to it as incompetent or irrelevant,



but by urging a special plea, the prætor, if he recognised the plea as valid, inserted it in the *formula* in the shape of an *exceptio*. The effect of the *exceptio*, if it were proved, was that the *judei* did not find the defender liable in spite of the fact that the *intentio*, containing the pursuer's claim, was true and relevant. Since a defence, which operated *ope exceptionis*, had to be expressly inserted in the *formula*, it must obviously be pleaded *in jure*, i.e. in the proceedings before the magistrate.

Among the more notable *exceptiones* in regular use were the *exceptio doli* (see *DOLUS MALUS*): *exceptio quod metus causa*; *exceptio pacti conventi*; *exceptio legis Cincie* (see *DONATIO*): *exceptio pecuniæ non numeratæ*; *exceptio rei judicatæ*; *exceptio rei venditæ et traditæ*; *exceptio pacti de non petendo*; *exceptio præjudicii*; *exceptio transactionis* (many of these exceptions are discussed in separate articles, e.g. *PACTUM DE NON PETENDO*; *TRANSACTIO*; *RES JUDICATA*). In addition to these, there were many other special pleas recognised by the prætors as valid, and given effect to *ope exceptionis*.

It was by means of *exceptiones* that effect was given to the equitable defences of the prætorian law. Indeed, an *exceptio* came practically to signify a plea which, though bad by the *jus civile*, was good in the *jus honorarium*. If the exception turned on disputed facts, the burden of proof lay on the defender, on the principle *Reus in exceptione actor est*.

An *exceptio* might be absolute (*peremptoria*) or dilatory (*dilatoria*). An absolute *exceptio* is valid without limitation; its effect is not only to free the defender from the depending action, but to destroy the pursuer's right of action upon the claim (*perimere causam*). Examples of absolute *exceptiones* were the *exceptio doli*; *exceptio metus*; *exceptio rei judicatæ*; *exceptio pacti de non petendi*. A dilatory *exceptio* is valid only for a time, or against certain persons: it is available where an action, which is legally competent, is brought at an improper time or in an improper manner. For example, by means of the *exceptio litis dividuæ*, a pursuer, who had already brought an action for part of a debt, could be prevented from bringing an action for the rest of it during the same prætorship: after that he was free to sue for the balance due. Similarly, by means of the *exceptio rei residuæ*, a pursuer who, having several actions against the same defender, has proceeded in some of them and postponed others, could be prevented from proceeding within the same prætorship in those which he postponed. The *exceptio cognitoria* was another dilatory plea. Dilatory exceptions must always be advanced at *litis contestatio*: although evidence need not be given in their support until the pursuer has proved his case (*Cod. iv. 19. 19*). Peremptory exceptions, on the other hand, might be brought forward at any stage, and might even be alleged for the first time on appeal (*Cod. 7. 62. 6. 1*).

The pursuer could meet an *exceptio* by a countervailing plea—an *exceptio* to an *exceptio* (*D. 44. 1. 22*). Such a *contraria exceptio* was a *replicatio* (for illustrations, see *D. 3. 3. 48*; *16. 1. 32. 2*; *50. 17. 154*). *Replicationes nihil aliud sunt, quam exceptiones a parte actoris, quæ exceptiones excludunt* (*D. 44. 1. 2. 1*). To the *replicatio*, the defender may have a countervailing plea (*duplicatio*): to this the pursuer may have a *triplicatio*: and so on. (On the whole subject, see *Gaius*, iv. 115–129; *Just. Inst.* iv. 13 and 14).

**Exceptio non numeratæ pecuniæ.**—When, in Roman law, one man obtained from another a written acknowledgment of debt, or a promise to pay a sum of money, the granter of the instrument (*chirographum*) was bound by it in law, although the money had not been lent or any valuable consideration received (see *Title, De literarum obligatione*,

*Inst.* iii. 21). A person, however, who had signed and delivered such an instrument could meet an action on it by pleading the *exceptio non numerata pecunia*, namely, that the money had not been advanced, or valuable consideration given. The effect of the *exceptio* was to throw upon the pursuer the onus of proving that the money had been advanced, or other valuable consideration given. At first the *exceptio* could be stated only within one year from the date of the instrument. The time was afterwards extended to five years, but finally it was settled at two years by Justinian (*Code*. 4. 30. 14 pr.). Further, in the later law, in order to prevent the holder of the instrument delaying his action on the instrument until the period within which the *exceptio* could be pleaded had elapsed, the granter of the instrument could bring a *condictio ob causam datorum*, compelling the holder either to prove the loan or consideration, or to deliver up the instrument (*Code*. 4. 30. 7); or he could make the *exceptio* perpetual by entering a protest in the records of a Court, and serving a formal notice on the holder of the instrument (*Code*. 4. 30. 14. 4).

In Scotland, in the older form of bond for borrowed money there was invariably a clause renouncing the "exception of not numerat money." This was a survival from the time when the moveable bond contained an express renunciation of all the *exceptiones* of the Roman law *scriptum*, with the result that the clause renouncing exceptions was by far the longest clause of the deed (Ross, *Lect.* i. 53).

It does not, however, appear that the *exceptio non numerata pecunia* was ever admitted into Scots law; so that the clause renouncing it was merely a clause of style, which added nothing to the force or effect of the debtor's obligation (Ersk. iii. 2. 5). After a bond is delivered to the lender, it lies on the borrower to prove the negative, not on the lender to prove the affirmative, of the advance (Bell, *Lect.* i. 246). Further, even although the bond contains an express renunciation of the exception of not numerated money, it is competent to prove the fact that the money was not really paid, by the writ or oath of the creditor. Moreover, if the creditor admit on oath that the bond is in error as to the amount advanced, the onus of proving the actual advance lies on the creditor (Hotson, 1831, 9 S. 685).

[Stair, i. 10. 11; Ersk. iii. 2. 5; Ross, *Lect.* i. 53; Bell, *Lect.* i. 246.]

**Exception (Sheriff Court).**—Reductions being incompetent in the Sheriff Court (*Fleishers of Glasgow*, 1824, 3 S. 305; *Porteous*, 1830, 8 S. 908; *Young*, 1830, 9 S. 59), it was formerly necessary to sist an action involving reductive conclusions till the reduction had been tried in the Court of Session (*McLaren*, 1857, 28 D. 48). Now, however, by the Sheriff Courts Act of 1877, all objections to a deed or writing founded on by either party in an action competent in the Sheriff Court may be stated and maintained by way of exception without the necessity of bringing a reduction thereof (40 & 41 Vict. c. 50, s. 11; see *Nirison*, 1883, 11 R. 189; *Scott*, 1886, 24 S. L. R. 34); provided always, that anyone taking objection in this way to a liquid document of debt may be required to find such caution or make such consignation as the Sheriff may direct (Act of 1877, s. 11).

**Exceptions, Bill of.**—See BILL OF EXCEPTIONS.

**Excerpts.**—See COPIES; EXTRACTS.

**Exchequer, Court of.**—*HISTORY*.—Before the Act of Union the Court of Exchequer was the Revenue Court of the Crown, and consisted of the Treasurer, the Treasurer-Depute, and as many Lords of Exchequer as the king was pleased to appoint. Its origin is somewhat obscure; but it would appear to have been originally a ministerial and auditing body, which gradually acquired judicial functions. By chapter 26 of the laws of King Robert III., Sheriffs are bound to account in the Exchequer. By the 19th Article of the Treaty of Union it was provided that a new Court of Exchequer should be established in Scotland, having the same authority in revenue cases as the Court of Exchequer in England, and that until the establishment of this new Court the existing should remain. The new Court was established by 6 Anne, c. 26, and declared to consist of the High Treasurer of Great Britain, a Chief Baron and four Barons of Exchequer. This Court remained in existence as constituted until 1832, when the first of a series of Statutes (2 Will. IV. c. 54; 4 Will. IV. c. 16; 5 & 6 Will. IV. c. 46; 1 Viet. c. 65; 2 & 3 Viet. c. 36; 18 & 19 Viet. c. 90), designed to curtail its functions, was passed. Finally, the Exchequer was abolished as a separate Court by the Court of Exchequer Act, 1856 (19 & 20 Viet. c. 56), and its jurisdiction and functions were transferred to the Court of Session.

*JUDICIAL FUNCTIONS*.—The duties of the Court of Exchequer, as constituted by 6 Anne, c. 26, were both judicial and ministerial. On its judicial side it took cognisance of all questions of custom or excise, and of all other revenues, debts, duties, and profits appertaining to the Crown, and of all lands falling to the Crown by force or virtue of any outlawry or attainder (6 Anne, c. 26, s. 6). Besides actions for the recovery of duties, actions of damages against revenue officers for illegal seizures (*Sharpe*, 1861, 23 D. 1015), suspensions and liberations from imprisonment for failure to pay duties (*Brough*, 1850, 13 D. 408), actions relating to ships seized under the Foreign Enlistment Act (55 Geo. III. c. 69, s. 7) (*H. M. Advocate v. Fleming*, 1864, 2 M. 1032), and an action for repetition of money paid by the Admiralty under a contract which was alleged not to have been properly fulfilled (*Lord Advocate v. Hogarth*, 1859, 21 D. 213), have been held to be Exchequer causes. But it is expressly declared that the Court of Session is the sole Court in relation to all disputes and competitions between the Crown and subjects with reference to property in lands, and in all questions regarding casualties due to the Crown (6 Anne, c. 26, s. 22). And an action of relief under a bond of caution for a collector of taxes has been held not to be an Exchequer cause (*Kinloch*, 1822, 1 S. 457 (N. E.) 529). The fact that a case was competent in the Court of Exchequer did not prevent its being also competent in the Court of Session, or even in the Sheriff Court, but it gave the Court of Exchequer the right to intervene by injunction, or, under the Court of Exchequer Act, 1856, s. 14, by interdict. The effect of such an injunction or interdict was that the proceedings in any other Court were brought to an end, and the case was commenced *de novo* in the Court of Exchequer (*Sharpe*, 1861, 23 D. 1015). In the same case it was held that this procedure might be resorted to by the Crown or by an officer of excise wherever the question was duly raised whether goods had been properly seized for a Crown debt.

*Procedure and Diligence*.—The procedure in the Court of Exchequer, as established by 6 Anne, c. 26, followed that of the English Court of Exchequer (s. 6). An appeal to the House of Lords was competent (s. 12), but was rarely taken. All persons entitled to practise in the Court of Session were entitled to practise in the Court of Exchequer (s. 4). The Lord Advocate, on behalf of the Crown, had a right to make the last speech in all Exchequer causes, a right which has been preserved by sec. 23 of the Court of Exchequer Act,



1856. The forms of diligence in use under the English revenue laws were introduced into Scotland, so far as the personal or moveable estate of the debtor was concerned (see *EXTENT*), but it was expressly declared that no debt to the Crown should affect any real estate in Scotland further and otherwise than that estate might be subject thereto by the existing law of Scotland (s. 22). In attaching the heritable estate of the debtor, therefore, under an Exchequer decree, the ordinary forms of adjudication were used, and the Crown had no preference over other creditors (Bell, *Com.* i. 781; *Creditors of Burnet*, 1754, M. 7873).

*MINISTERIAL FUNCTIONS.—Crown Charters.*—The chief ministerial functions of the Court of Exchequer related to the transfer of lands held from the Crown, and to the appointment of tutors-dative. When it was proposed to convey lands held of the Crown, whether absolutely or in security, a signature, or draft of the charter which it was proposed to grant, was lodged with an officer of the Exchequer, known as the Presenter of Signatures. The signature was revised and signed by one of the Barons of Exchequer, and formed a warrant for sasine on which a Crown charter might proceed (Menzies, *Conveyancing*, p. 825). The necessity for lodging a signature was removed by the Crown Charter Act, 1847 (10 & 11 Vict. c. 51), but the office of the Presenter of Signatures survived, and fulfilled the duty of a reviser of Crown charters, until its functions were merged in those of the Sheriff of Chancery by the Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 57). Where a signature involved any new grant, the royal superscription was necessary, after it had been passed by the Barons of Exchequer (Ersk. i. 3. 32).

*Appointments of Tutors-Dative.*—The appointment of a tutor-dative was made by a signature in the Court of Exchequer, a procedure now superseded by a petition to either Division of the Court of Session (19 & 20 Vict. c. 56, s. 19).

*COURT OF EXCHEQUER ACT, 1856.*—By the Court of Exchequer Act, 1856, the functions of the Court of Exchequer are transferred to the Court of Session, which is declared to be the Court of Exchequer in Scotland. One of the Lords Ordinary, appointed by the Crown, acts as Lord Ordinary in Exchequer causes: and Exchequer proceedings, if commenced in the Outer House, must be brought before him (s. 2). An Exchequer case may commence by a subpoena, which may be called in Court as a summons, or by a summons in ordinary form (ss. 5–10). An interlocutor of the Lord Ordinary is subject to review as in ordinary actions (s. 20). By secs. 11–17 new procedure is provided in lieu of certain Exchequer processes relating to the seizure of goods, writs of capias, writs of the pipe, etc. Secs. 24 to 39 deal with the execution of Exchequer decrees by the Sheriff, by the ordinary forms of diligence. Sec. 42 preserves unimpaired all preferences of the Crown in competition with other creditors. Preference is given to Exchequer over other causes (s. 25), the right of the Lord Advocate to the final speech is preserved (s. 23), and it is declared to be competent to grant expenses to or against the Crown (s. 24).

*Effect of this Act.*—The general effect of this Statute has been held to be to substitute the Court of Session for the Court of Exchequer in all respects, so that any case or proceeding formerly competent in the Court of Exchequer may be heard in the Court of Session, even although not expressly provided for by the Act (*Quarter Sessions of Perth*, 1861, 23 D. 221).

*APPEALS UNDER THE STAMP ACT.*—An important provision, with regard to revenue cases, has been inserted in the Stamp Acts, and is now



enacted by the Stamp Act, 1891. By this provision, the Commissioners of Inland Revenue may be required to decide on the amount of duty due on any particular instrument, and to state a case for the opinion of the Court of Session, sitting as Court of Exchequer, setting forth the question on which their opinion was asked, and the amount of assessment made by them (ss. 13, 122). Before such an appeal, the duty as assessed must be paid. If the appeal is successful, the appellant will recover the duty paid, with or without expenses, as the Court may decide; if unsuccessful, he may be found liable in expenses (s. 13, subs. 4, 5). Such cases are sent directly to either Division of the Court, and not to the Lord Ordinary in Exchequer causes. The Court has no jurisdiction, in such an appeal, to consider questions of duty arising on the same deed, but which have not actually been adjudicated on by the Commissioners (*Maxwell*, 1866, 4 Macp. 1121).

[See *Stair*, iv. 1. 29; *Ersk.* i. 3. 30; *Bell, Com.* ii. 40; *Mackay, Practice*, i. 43, 192; *Mackay, Manual*, 71; *Menzies, Conveyancing*, 825; *Clerk and Scrope, Historical View of the Court of Exchequer in Scotland*.]

See EXTENT, WRIT OF; PRESENTER OF SIGNATURES; TUTOR.

**Excise** is an inland imposition, under the authority of Parliament, sometimes paid upon consumption, but more frequently upon the retail sale of commodities. It is distinguished from customs, which consist of duties imposed upon the importation or exportation of commodities. The excise was first introduced into Scotland by Act 1644, c. 36. But it was not till the reign of Charles II. that it began to gain a permanent footing, when by Act 1661, c. 14, duties were imposed both upon certain commodities imported from abroad, and also upon certain commodities manufactured at home. The 18th Article of the Treaty of Union declared that the laws concerning excise were to be the same for both kingdoms. While the excise was originally an impost upon commodities for consumption, such as spirits, malt, etc., it has since come to include the duties imposed on the licences of persons engaged in the sale of excisable liquors, and on the licences of persons engaged in certain trades, *e.g.* auctioneers, and on the licences to keep servants, dogs, kill and deal in game, and wear armorial bearings. The provisions regulating excise are entirely statutory; and as the duties are varied from year to year by Parliament, it is only by a reference to the Statutes that the duties and penalties exigible at a particular date can be ascertained. The management of the excise was first placed under Special Commissioners by the Act 1661, c. 14. Their powers and duties were, in 1849, transferred to the Board of Inland Revenue by 12 Vict. c. 1, in which, and 7 & 8 Geo. iv. c. 53, as amended by 4 & 5 Will. iv. c. 51, are enacted the principal rules with reference to the control and management of the excise.

[See *Boyd, Justice*, 965; *Hutcheson, Justice*, iii. 333; *Bell and Donnelly, Excise Acts*.]

**Exclusive Privilege** is the term applied in our law to the exclusive right of exercising trade or business within a burgh formerly enjoyed by burgesses through the incorporations of the various trades (*Bankt.* i. 50. 21; i. 57. 50; *Kames, Elucidations*, art. 7). For examples, see *Shaw, Digest, sub voce* "Corporation." For the exclusive privilege of reproduction of their works granted by Statute to authors, artists, and inventors, see COPYRIGHT (LITERARY AND ARTISTIC); and PATENTS; DESIGNS; TRADE MARKS.

**Excommunication.**—This was an ecclesiastical sentence which excluded from the communion of the Church the person against whom it had been pronounced. At first the censures of the Church were solely of a spiritual nature: but, from an early period, the clergy were in use to call in the secular arm to supplement ecclesiastical penalties with those of a temporal nature. The offender against the Church was punished in his goods and person; and eventually, in the case of serious offences, such as heresy, the secular Courts, at the bidding of the Church, inflicted the supreme penalty upon the accused.

The Reformation wrought this beneficial change—that those who were sentenced by Church Courts could not be subjected to severe punishment in their persons. But excommunicated persons were still liable to be punished in their goods and estate. The ancient law, as contained in the *Consuetudines Feudorum*, was that neither Jews, heretics, nor excommunicated persons could enjoy feudal rights. By two Acts of the year 1609 (c. 3 and c. 4) the rents and revenues of all persons excommunicated for religious causes were forfeited to the Crown. By the latter of these Statutes the directors of Chancery and subject superiors were forbidden to expedite any heritable title in favour of excommunicated persons. These Acts were ratified by 1661, c. 25. And by the Statutes 1572, c. 53; 1661, c. 25; 1663, c. 23, it was enacted that, on sentence of excommunication, letters of horning and caption should issue, and should be followed with the ordinary consequences of civil rebellion (see **HORNING**).

The Act 1690, c. 28, provided that no civil penalties should follow on sentence of excommunication. A similar provision was made by the Act 10 Anne, c. 7, which further prohibits any civil judge from lending his aid to enforce the presence of an accused person before a Church Court, when summoned in a process of excommunication, or to compel him to obey such sentence, when it has been pronounced.

[Hume, i. 574; Ersk. ii. 3. 16; Ross, *Lect.* i. 90, 248.]

See **CURSING**, **LETTERS OF**.

**Exculpation, Letters of.**—Prior to the Restoration an accused person had no means of compelling the attendance, at the Court of Justiciary, of witnesses whom he wished to adduce in exculpation. Subsequent to that event the Justiciar was in use to grant to a panel, as matter of equity, letters of exculpation, to enable him to compel the presence at the trial of witnesses whose testimony he desired to have. The Act which established the Court of Justiciary, in 1672, provided that letters of exculpation should be issued from the Justiciary Office, when they were demanded by a panel. These letters are now unknown in practice.—[Hume, ii. 398; Stair, iv. 14. 17; Ersk. iv. 4. 90.]

**Execution by Messenger or other Officer.**—The execution is the certificate, attestation, or return, by the proper officer, of the carrying out of a legal warrant, by its intimation to or service upon the party to or against whom it is directed. The contents of the execution vary according to the warrant upon which it is founded, and the proceedings following thereon. These various warrants, and the various methods of executing them, will be found described under their proper headings, such as citation, charge, or other diligence, as the case may be. The

execution is practically a narration of the contents of the schedule which has been served upon the party therein named, and is the *prima facie* evidence of what has been done. Executions may be either written or printed, or partly both. The following are the requirements in the case of certain warrants mentioned:—

(1) *SUMMONS*.—The execution contains the name of the messenger, and states in what manner the service was made—by delivery of the copy personally, at the dwelling-house, by post, or edictally (*Stewart*, 1860, 22 D. 1514). It is written at the end of the summons or certified copy, and, where necessary, on continuous sheets, but not on a separate paper (*Kennedy*, 1863, 2 M. 232). It specifies the date of execution, and is signed by the messenger and a witness, who is named and designed in it, and who is a witness to the facts attested, and therefore must have been present at the carrying out of the warrant (1681, c. 5; 1686, c. 4; Debtors (Scotland) Act, 1838, 1 & 2 Vict. c. 114, s. 32, amended by 9 & 10 Vict. c. 67; Court of Session Act, 1850, 13 & 14 Vict. c. 36, s. 20, Sched. B). The form given in Sched. B above mentioned should be adhered to, and is as follows:—

This summons [or note of suspension, or note of suspension and interdict, or note of suspension and liberation, or note of advocation], executed [or intimated] by me [insert name], messenger-at-arms, against [or to] [insert name or names], defender [or defenders, or respondent, or respondents] [state whether personally or otherwise], in presence of [insert name and designation of witness], this                      day of                      18        years.  
[Signature of Messenger.]

C. D., Witness.

The method of service may be stated as follows:—

“By delivering to him personally a full double thereof, excepting the will, having a just copy of citation subjoined,” or “by leaving for him,” etc., as above, “within his dwelling-place in                      , with a servant therein, to be given to him, because I could not find himself personally,” or “by delivering,” etc., “at the Office of the Keeper of the Record of Edictal Citations, within the General Register House, Edinburgh, in terms of the Statute, and Act of Sederunt thereanent,” or as the case may be.

The execution of Sheriff Court writs is subject to practically the same rules (see Sheriff Court Act, 1838, 1 & 2 Vict. c. 119, s. 23; A. S. 10 July 1839, s. 15; Sheriff Court Act, 1853, 16 & 17 Vict. c. 80, s. 9; and Sheriff Courts Act, 1876, 38 & 39 Vict. c. 70, s. 12). If the various requisites are regularly set out in the execution and there is no patent objection, it can only be challenged in an action of reduction (*Tait*, 1891, 18 R. 606, 28 S. L. R. 431; *Gibson*, 1895, 23 R. 295, 33 S. L. R. 174). It is not competent to supply omissions by parole evidence. A summons that has been called ceases to be a warrant for execution, and a citation of new cannot be given; but in the Sheriff Court, when a party does not appear, the Sheriff may order service of new (Sheriff Courts Act, 1876, s. 12). A party appearing in answer to a citation cannot state objections to the regularity of the execution (Court of Session Act, 1868, s. 21; Sheriff Courts Act, 1876, s. 12). In Sheriff Court actions exception may be taken to a deed or writing founded on, without a reduction being brought (Sheriff Court Act, 1877, s. 11), and this has been held to apply to the execution of a peace warning (*Scott*, 1886, 24 S. L. R. 34).

Citations made under the Bankruptcy (Scotland) Act, 1856, do not require a witness (19 & 20 Vict. c. 79, s. 175).

(2) *CITATION OF A WITNESS*.—The execution need not be written upon the warrant. It sets forth the fact and manner of the citation. A



witness is not necessary (1 Will. iv. c. 37, s. 7; Court of Session Act, 1850, s. 43; Sheriff Court Act, 1853, s. 11).

(3) *POSTAL CITATION*.—Where service is made by registered letter in terms of the Citation Amendment (Scotland) Act, 1882, 45 & 46 Vict. c. 77, the execution will be in the form of the schedule appended to the Act. This Act applies to any summons, warrant of citation, warrant of service, or judicial intimation, but does not include diligence (*Lockhead*, 1883, 11 R. 201, 21 S. L. R. 144; *Gow*, 1895, 1 Adam, 534). The execution will be signed by the messenger, officer, or law agent, as the case may be. The signature of a law agent's apprentice is not sufficient (*Wilson*, 1885, 13 R. 342, 23 S. L. R. 227). The execution, in addition to the other necessary contents, states the date and the hours between which the citation was posted, the post office, and the address on the letter, and must be accompanied by the post-office receipt therefor. A witness is not necessary. The following are forms of citations by a law agent, of a party and a witness respectively:—

This summons, or petition [or, as the case may be], executed by me [insert name], law agent, against \_\_\_\_\_, defender, by posting on \_\_\_\_\_ last, between the hours of \_\_\_\_\_ and \_\_\_\_\_, at the post office of \_\_\_\_\_, a copy of the same to him, with citation subjoined, in a registered letter addressed as follows, viz. :—

[Signature of Agent.]

Upon the \_\_\_\_\_ day of \_\_\_\_\_ I duly cited C. D. [design him] to attend in the Sheriff Court of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ o'clock, within \_\_\_\_\_, to give evidence for the pursuer [or defender] in the action at the instance of A. [design him], pursuer, against B. [design him], defender [if a haver, say], and I also required him to bring with him [specify documents]. This I did by posting on \_\_\_\_\_ last, between the hours of \_\_\_\_\_ and \_\_\_\_\_, at the post office of \_\_\_\_\_, a just copy of citation to the above effect, signed by me, in a registered letter, addressed as follows, viz. :—

Law Agent [address].

In a citation in the Court of Session it is usual to describe the warrant.

(4) *EXECUTION OF DILIGENCE*.—(a) *Charge*.—The execution of charge specifies the names and designations of the debtor and creditor, and the nature and date of warrant on which the charge proceeds. The form is given in the Debtors (Scotland) Act, 1838, Sched. 2. As to errors in the execution, see *Beattie*, 1844, 6 D. 1088; *Henderson*, 1871, 10 M. 104, 44 J. 73; and *Clark*, 1875, 3 R. 166, 13 S. L. R. 95. Registration of the charge within year and day accumulates the debt and past interest (Debtors (Scotland) Act, 1838, s. 10).

(b) *Poinding*.—An execution of poinding must state the date of the poinding, the diligence under which it was executed, the amount of debt, the names and designations of the debtor and creditor, the publication of the warrant, the effects poinded and their value, the names and designations of the valutors, the person in whose hands the effects were left, and the delivery of the schedule: and if the goods are claimed by a third party, the fact should also be set forth. The execution is signed by the officer and two valutors, who are also the witnesses, and has to be reported to the Sheriff within eight days of the poinding (Debtors (Scotland) Act, 1838, s. 25, and 9 & 10 Vict. c. 67).

(c) *Arrestment*.—In addition to the other particulars in an arrestment on a Sheriff Court warrant, the execution must state, where the arrestment has not been made personally, that a copy of the schedule of arrestment was sent to the arrestee, and his address (Sheriff Courts Act, 1876, s. 12).



A witness is necessary, who is designed in, and subscribes, the execution (1681, c. 5; Debtors (Scotland) Act, 1838, and 9 & 10 Vict. c. 67). In the case of arrestments in the Sheriff Court, a return of the execution has to be made forthwith to the Sheriff Clerk (A. of S. 10 July 1839, s. 18). An error in the execution in the date of the decree on which it proceeded was held fatal to the arrestment in *Graham*, 1875, 2 R. 972.

(d) *Inhibition*.—The execution requires to be registered within twenty-one days to preserve the effect of a previously recorded notice, and within forty days to preserve the effect of the inhibition itself (1581, c. 119; 1681, c. 5; Titles to Land Consolidation (Scotland) Act, 1868, s. 156).

(e) *Interruption of Prescription*.—The execution has to be registered within sixty days (1581, c. 119; 1696, c. 19).

(f) *Interdiction*.—The execution requires to be registered within forty days (1581, c. 119; 1681, c. 5).

(g) *In Small Debt Proceedings* a witness to the execution is not required, except for pouding or sequestrating (Citation Amendment (Scotland) Act, 1871, s. 4; Small Debt Amendment Act, 1889, s. 11); and proof of citation is competent by oath of the officer, as well as by written execution (1 Vict. c. 41, s. 3, Small Debt Act, 1837).

**Execution.**—See DILIGENCE, ETC.; CITATION; DECREE; EXECUTION BY MESSENGER, ETC.; SENTENCE; CAPITAL PUNISHMENT.

**Execution of Deeds.**—See DEEDS, EXECUTION OF.

**Executor.**—An executor is the person who has the legal title to uplift and ingather the moveable estate of a deceased person, and to distribute it amongst those who are entitled to it. He draws his authority either from his appointment by the deceased in his testament, or from a decree of the Commissary Judge (see CONFIRMATION OF EXECUTORS). The appointment of executors is a usual but not a necessary part of a testamentary disposition.

The office of an executor is constantly confused with that of a trustee, but there is a clear distinction. The duty of the executor is to realise and distribute the estate of the deceased; that of the trustee, to hold and administer it for the trust purposes. “An executor is not a trustee in the sense of being a depository. A trustee has to hold as a depository; not so an executor, who has to administer, not to hold. An executor must pay legacies and debts within a certain time, and is liable for interest if he does not. An executor is nothing else than a debtor to the legatees or next of kin. He is a debtor with a limited liability, but he is nothing else than a debtor; and the creditors of the deceased, and the legatees who claim against him, do so as creditors” (per Lord Pres. Inglis in *Jamieson*, 1872, 10 M. 399).

In early times, when testamentary deeds were usually conceived in the form of absolute dispositions, the whole moveable estate of the deceased passed to his executor, and there was nothing but his own sense of right to compel the executor to distribute it amongst the children or next of kin of the testator according to the intention of the testator. To remedy the abuse of the office which was prevalent, the Act 1617, c. 14, “Anent Executors,” was passed, which obliged all executors “to make count, reckoning, and payment of the whole goods and gear appertaining to the defunct, and intromitted with by them, to the wife, children, and nearest of kin,

according to the division observed by the laws of this realm, reserving only to the saids executors the third of the defunct's part, all debts being first payed and deduced," with a further declaration that no legacy left to the executor should be "prejudged" by the Act, and that the executor should not be permitted to take both the legacy bequeathed to him and the "third" allowed by the Act. The executor's right to the "third of the defunct's part" was abolished by the Intestate Moveable Succession Act of 1855 (18 & 19 Viet. c. 23, s. 8; see *Grant*, 1849, 12 D. 201, 1 Macq. 178; *Lowndes*, 1862, 24 D. 1391). An executor, therefore, *qua* executor, receives now no benefit from the estate as remuneration for his services.

As has been already mentioned, the executor derives his authority to administer the estate either from his appointment made by the deceased himself, or from a decree of the Court. In the former case, he is called an executor-nominate, and in the latter an executor-dative. The nomination of an executor in a testamentary deed must be sufficiently clear to make the identification of the nominee possible, and the use of the word "executor" is not indispensable. Thus, an appointment of a person by name as "judicial factor to carry out the purposes of this trust" is sufficient (*Tod*, 1890, 18 R. 152). But where a testator declared that "my cousin A. B. is to be my heir," and then proceeded to bequeath specific legacies, including one to A. B., it was held that whatever might be the ultimate interpretation of the will, it was not clear from it that A. B. was a universal donee, and entitled to the office either as executor-nominate, or in preference to one of the testator's next of kin, who claimed to be deemed executor-dative (*Jerdon*, 1897, 4 S. L. T. No. 342). The nomination of testamentary trustees is sufficient, in the absence of evidence of a contrary intention on the part of the testator, to entitle the trustees to the office of executors-nominate (see *Martin*, 1892, 19 R. 474). Where there is no executor-nominate, or where the person nominated has failed or declined to come forward, the law provides that the office may be conferred on certain persons. The following persons may, in their order, failing an executor-nominate, apply to the Sheriff, as Commissary Judge, to be deemed executors-dative: (a) The universal donee, taking under a general disposition and settlement; (b) the next of kin of the deceased, taking a beneficial interest in the succession; (c) the relict; (d) creditors of the deceased; (e) a legatee. If the next of kin has no beneficial interest in the estate, his right to confirmation is postponed to that of anyone who has, but he is entitled to confirmation in the absence of anyone who has a better title (*Bones*, 1866, 5 M. 240). Next of kin are those in their order who would be entitled to succeed to the personal estate of a deceased intestate. They are: (1) Children and their descendants; (2) brothers and sisters german, whom failing, their descendants; (3) brothers and sisters consanguinean, whom failing, their descendants; (4) the father; (5) brothers and sisters of the father; and so on. Any number of these, in the same degree of relationship to the deceased, may apply to be conjoined in the office. The Intestate Moveable Succession Act of 1855 (18 Viet. c. 23, s. 1) provides that "the surviving next of kin of the intestate claiming the office of executor shall have exclusive right thereto in preference to the children or other descendants of any predeceasing next of kin, but that such children or descendants shall be entitled to confirmation when no next of kin shall compete for said office" (see *Dowie*, 1871, 9 M. 726). By the same section it is declared that no representation shall be admitted among collaterals after brothers' and sisters' descendants. Brothers and sisters uterine are not next of kin, but they have an interest under the Act of 1855, which

will entitle them to confirmation in the absence of anyone having a better title.

The father of a deceased intestate is, however, in virtue of his rights under the Intestate Moveable Succession Act of 1855, entitled to be conjoined in the office with the next of kin (*Webster*, 1878, 6 R. 102). His mother, though not entitled to compete with the next of kin, may be decerned executrix in the absence of anyone having a preferable title (*Muir*, 1876, 4 R. 74). A husband, who takes an interest in his predeceasing wife's moveable estate under the Married Women's Property Act of 1881 (44 & 45 Vict. c. 21, s. 6), has a right to confirmation as executor-dative, but this right is postponed to that of the next of kin (*Stewart*, 1890, 17 R. 707). The moveable estate of a deceased intestate vests *ipso jure* in his next of kin who survive him, even if they die before confirmation is expedite (4 Geo. iv. c. 98, s. 1), and the right thus vested can be assigned, giving the assignee a title to confirmation in conjunction with other next of kin (*Mann*, 1830, 8 S. 468; see also *Webster*, 1878, 6 R. 102). Two or more persons who claim in different characters, but each of whom would separately be entitled to the office, may be conjoined as executors-dative (*Muir*, 1876, 4 R. 74). The assignee of a legatee is also entitled to the office, if no one having a preferable title comes forward (*Macpherson*, 1855, 17 D. 358). Where no one else who has a title to the office comes forward, a *curator bonis* or judicial factor whose ward has a beneficial interest in the estate, may be decerned executor (A. S. 13 Feb. 1730). Where a subject of a foreign State dies in this country leaving no one here entitled to administer his estate, the consul of that State may apply for power of administration (24 & 25 Vict. c. 121 s. 4). Minors or even pupils may be appointed or decerned executors, either in their own names or along with their tutors and curators (*Johnstone*, 1838, 16 S. 541). In the case of the pupil, his tutor takes the oath; in the case of the minor, his curator concurs in the oath. Where there are no tutors or curators, the usual practice is to appoint a factor. This subject has been already discussed under the title CONFIRMATION OF EXECUTORS (*q.v.*).

An executor-nominate applies to the Sheriff, as Commissary Judge, for confirmation of his appointment. A person who claims the office of executor-dative applies first to the Sheriff for decerniture as executor-dative *qua* universal disponee, or *qua* next of kin, or as the case may be, setting forth the grounds of his claim in his petition, and after decerniture he applies again for confirmation of his appointment (for details of procedure, see CONFIRMATION OF EXECUTORS). The executor, whether nominate or dative, must lodge with his application for confirmation an inventory of the whole moveable estate of which the deceased died possessed. The executor-dative must at the same time find caution, which is usually fixed at a sum not exceeding the value of the estate given up in the inventory, but which may, on cause shown, be fixed at a lower sum. The executor-nominate is not required to find caution (4 Geo. iv. c. 98, s. 2). Except in the case of an executor-creditor, the confirmation must be to the whole of the moveable estate of the deceased, and if part of it is, by accident or through ignorance of its existence, omitted, the executor must make an *elik* to his CONFIRMATION (*q.v.*).

When he has obtained confirmation, the executor is entitled to administer the estate of the deceased. His first duty is to ingather and realise the estate set forth in the inventory, in order that he may distribute it amongst those entitled to it. His liability to those entitled to share in the estate does not extend *ultra fines inventarii*, and anyone who has an interest in the



estate, and is dissatisfied with the inventory given up, has his remedy in applying for confirmation AD OMISSA VEL MALE APPRETIATA (*q.v.*).

The executor is allowed twelve months to ingather and realise the estate; that is to say, he will not be held liable for interest on outstanding debts beyond what he actually receives, until after the expiry of that period. He is bound to exercise due diligence in realising the estate for behoof both of the creditors of the deceased and of the legatees or next of kin, and if he fails in this he will be held responsible for debts unrealised at the end of the twelve months (see *Forman*, 1853, 15 D. 362; *Pearson*, 1825, 4 S. 205), and the fact that he is himself interested in the estate as a beneficiary is no excuse for want of diligence (*Forman, ut supra*). A decree and registered charge against a debtor is sufficient diligence, and he is not bound to incur unnecessary expense in doing diligence against an insolvent debtor, when there is no possibility of recovering the debt (*Ersk. iii. 9. 41*). His discharge to a debtor of the deceased is valid and sufficient, and the debtor is not concerned with the future application of the money (*Hutchison*, 1837, 15 S. 1100), unless he has paid it to the executor in the knowledge of his intention to misapply it (see *Taylor*, 1830, 4 W. & S. 444). He, or an agent employed by him, is the only person who can grant a valid discharge to a debtor of the executry estate (*Burnet*, 1831, 10 S. 128), and a discharge by a beneficiary is not a sufficient protection to the debtor (*Hinton*, 1883, 10 R. 1110). The executor's discharge is only valid to the extent of the sum to which he has been confirmed, and the debtor is not safe in paying a larger sum (*Buchanan*, 1842, 5 D. 211). Where more executors than one have been confirmed, the debtor should see that the discharge is binding upon them all before he makes payment. Where the executor, in the exercise of his discretion, is satisfied that an alleged debt to the estate is not really due, he cannot be forced to proceed against the alleged debtor by a beneficiary who takes a different view, but such a beneficiary is entitled to obtain the use of the executor's name in order to prosecute the claim, upon giving the executor an indemnity for expenses (*Blair*, 1894, 1 S. L. T. 599). The executor is entitled to a reasonable time to realise investments (see *Buchan*, 1879, 6 R. (H. L.) 44; *Hughes*, 1856, 22 Beav. 181), and to dispose of a going business to the best advantage. If he carries on the business of the deceased, he is liable for the administration thereof to the legatees or next of kin, but he is not in the position of a trustee for the creditors of the deceased, and they cannot claim more than the value of the business as given up in the inventory (*Stewart*, 1896, 23 R. 739; *Globe Insurance Co.*, 1849, 11 D. 618; 1850, 7 Bell's App. 296). The goodwill of the business may be an asset which should be included in the inventory (*Donald*, 1893, 21 R. 246; *Philp*, 1894, 21 R. 482).

Where part of the estate of the deceased consists of shares in a joint-stock company, the executors have two courses open to them. "They may either simply make up a title by confirmation, and so vest themselves with a right or title to the shares, which will enable them to dispose of the shares without going on the register, and may intimate the fact of confirmation to the company as a mere notice that they have made up such a title; or they may, if they think fit, intimate the confirmation to the bank, and request that the shares shall be transferred to their names, the legal result of which is that they thereby make up a title of ownership in themselves to the shares, and thereby become partners" (per *Ld. Shand* in *Wishart*, 1879, 6 R. 1349). They are thus entitled to transfer the shares without incurring any liability as partners of the company (see 25 & 26 Vict. c. 89, s. 24), but if this is their intention, they must



notify the company to that effect. "If they send in their confirmation without any such qualification . . . it will be forthwith recorded, and recorded in such a way as to make the executors partners" of the company (per Ld. Pres. Inglis in *M'Ewan*, 1879, 6 R. 1319). Executors who do not wish to be put upon the register of shareholders are entitled to have a reasonable time allowed them to sell the shares, and to produce a purchaser who will take a transfer of them (per Ld. Chan. Cairns in *Buchan*, 1879, 6 R. (H. L.) at p. 46). "Executors have a strong presumption in their favour which will not arise in the case of an ordinary transferee,—as, *e.g.*, in the case of a purchase,—and will not arise in the same degree in the case of trustees who are in the administration of a continuing trust—they have this strong presumption in their favour, where they do not intend to hold the stock, but intend to sell it within a short time—that they do not mean to put their names on the register, and so acquire a title of ownership in their own persons as individuals in the shares" (per Ld. Shand in *Wishart*, *ut supra*, 6 R. 1350; see also *Gordon*, 1879, 7 R. 55).

When the executor has taken the necessary steps to realise the estate, he should then proceed to pay the debts of the deceased. These, whether they are secured or unsecured, should be settled by the executor before he makes any payment to legatees, or distributes any part of the estate amongst the next of kin. He should, therefore, make full inquiry by advertisement and other means, as to what claims may be made by creditors against the estate. He is not bound to make any payment until the lapse of six months from the date of the deceased's death; and if he makes any payment during that period, he runs the risk of personal liability, in the event of the estate turning out to be insufficient to meet all the claims upon it. An exception is made, however, in the case of certain debts and obligations which are privileged, and which may safely be discharged by the executor before the expiry of the six months, if he is satisfied that they are due. These are the expenses of confirmation: deathbed and funeral expenses; reasonable mourning for the family of the deceased; aliment for his family till the term following his decease (see *Riddell*, 1802, Mor. voce "Aliment," App. 1, No. 4; *Taylor*, 1851, 13 D. 948); a year's rent of the house occupied by him (*Dunipace*, 1750, Mor. 11852); the wages of domestic or farm servants for the year or term current, according as they are payable yearly or termly (see *Ridley*, 1789, Mor. 11854); Crown taxes for a period not exceeding one year (43 Geo. III. c. 150, s. 33); assessments for poor-rates (8 & 9 Vict. c. 83, s. 88); and rates payable under the Ministers' Widows' Fund Act of 1779 (19 Geo. III. c. 20, s. 19). These debts and obligations, whether paid before or after the expiry of the six months, should be paid or provided for before any other payments are made (Ersk. iii. 9. 46). See PRIVILEGED DEBTS.

The six months are intended to afford creditors of the deceased an opportunity of producing their claims, and creditors doing diligence within that period are entitled to rank *pari passu* on the estate. When the six months have expired, the executor may pay in safety *primo venienti*, unless he has, or ought to have, reason to doubt the solvency of the estate. A creditor who comes forward afterwards "must look for payment not to the trustee, who has honestly and in good faith handed over the funds to the beneficiaries, but only to the beneficiaries or legatees who have actually received the funds themselves" (per Ld. Gifford in *Beith*, 1875, 3 R. 185; see *Stewart's Trs.*, 1871, 9 M. 810). If, however, a creditor, who claims after the expiry of the six months, finds the estate still undistributed in the

hands of the executor, he is entitled to be ranked *puri passu* on the estate, even with other creditors who have already obtained decree against the executor (*Russell*, 1791, Bell's Oct. Ca. 217). All known debts should be provided for before any payment is made to beneficiaries; and where executors had been misled by an overestimate of the value of the estate, and had made payments to beneficiaries without retaining sufficient to meet the claim of a creditor, they were held personally liable (*Lamond's Trs.*, 1871, 9 M. 662). Where the executor is satisfied that the claim is a good one, it is not necessary for the creditor to constitute it; where, however, "the executry estate is small, and the amount of claims uncertain, and the existence or amount of the alleged debt at all doubtful, the executor is entitled to protect himself and the estate by requiring formal constitution" (per *Ld. Pres. Inglis* in *M'Gaan*, 1883, 11 R. 249); but where the executor unreasonably opposes a claim, he will be found personally liable in expenses (*Law*, 1876, 3 R. 1192). When there is double distress, that is, when the claims made against the estate exceed the amount of the estate itself, the executor is entitled to raise an action of multiplepinding in order to obtain exoneration (*Jamieson*, 1888, 16 R. 15); but such an action is not competent where there is no double distress, but only questions of difficulty as to the validity of claims against the estate; and an executor raising an action of multiplepinding in such circumstances may be found personally liable in expenses (*Mckenzie*, 1895, 22 R. 233). The acknowledgment of a debt by the testator in his testament does not give the creditor therein any advantage over other creditors of the deceased who claim timeously (*Curriehill*, 1624, Mor. 3864). Where the executor is himself a creditor on the estate, his confirmation is held to be a step of diligence for recovering what is due to him, for he cannot be expected to raise an action against himself (*M'Douall*, 1744, Mor. 10007; *M'Leod*, 1837, 15 S. 1043; see *Elder*, 1859, 21 D. 1122). On the expiry of the six months, therefore, if no other creditor has done diligence, he is entitled to pay himself from the estate any debt due to him, and to relieve himself of any obligation he may have incurred as cautioner for the deceased.

The office of an executor is a personal one, and does not descend to his heirs. Where one of two or more executors dies, the office accrues to the survivors, whether they are executors-nominate or executors-dative (*Stair*, 3. 8. 59; *Anderson*, 1866, 5 M. 32). Where a person who is a sole executor, or the last survivor of a body of executors, has himself a beneficial interest in the estate, the estate vests in him on confirmation; and in the event of his death before he has reduced it into his possession, the whole estate, and not merely that part of it which he has actually reduced into possession, passes to his representatives, against whom persons interested in it may claim for their share. An executor-dative is always held to have taken out confirmation for his own interest. But the estate does not vest in an executor-nominate, who has only been confirmed for behoof of others, until he has actually reduced it into possession. If he, therefore, being sole or last surviving executor, dies before he has actually obtained possession of the estate, the confirmation lapses, and it is necessary that there should be a new confirmation *ad non executu*. If a substitute has been nominated in the testament, it is not necessary that he should be decerned executor, though he must obtain confirmation; but if there is no such substitute-nominee, an application must be made in the ordinary manner for decerniture as executor-dative, and caution must be found. The new inventory need contain only that part of the estate which the original executor had not reduced into possession. Where the estate has been reduced into possession,

but has not been distributed, confirmation *ad non executu* is not competent. The estate falls into the position of a lapsed trust, and those interested in it may raise an action of declarator and adjudication against the heir of the deceased executor. Confirmation *ad non executu* is now of rare occurrence, but it is still competent and may be necessary. Executors *ad non executu*, though they do not assume responsibility for their predecessor, may be bound to call his representatives to account for his intromissions with the estate (*Nicol*, 1856, 18 D. 1000).

The office of an executor, as has already been pointed out, is not the same as that of a trustee, but the point at which the one office passes into the other is often very difficult to determine. Strictly speaking, a trustee who is confirmed as executor should, as executor, realise the estate, pay the debts of the testator, and then convey the remainder of the estate to himself as trustee for administration according to the trust purposes. In a case where several trustees are nominated by the testator, it would be quite competent for one of them to be confirmed as executor, perform the duties of the executor, and then convey the estate to himself and his co-trustees for administration of the trust (see *Orr Ewing*, 1885, 13 R. (H. 1.), per Ld. Watson at p. 25). So narrow is the line between the offices, that questions have arisen as to whether persons who are nominated executors without being nominated trustees, are entitled to the advantages which are conferred upon trustees by the Trusts Acts. This seems to depend upon whether the testator has imposed upon his executors any duties which pertain to the office of trustee rather than to that of executor. Where, for example, the terms of the will involved the retention of the estate for some time in the hands of the executors, it was held that they were in effect gratuitous trustees, and, as such, entitled to assume new trustees under the power given by sec. 1 of the Trusts Act of 1861 (*Ainslie*, 1886, 14 R. 209). Where, again, a testatrix had bequeathed certain heritable property in liferent and fee, and had appointed executors without appointing them trustees or conveying the property to them, the executors, who had completed a title under sec. 46 of the Conveyancing Act of 1874, were held entitled to petition for power to feu, under sec. 3 of the Trusts Act of 1867 (*Pettigrew*, 1890, 28 S. L. R. 14). Where, therefore, the immediate distribution of the executry estate is impossible, and it is necessary for the executors to retain it in their hands, they would probably be entitled to exercise any of the privileges of gratuitous trustees, such as resignation or assumption of new trustees, and to claim any of the immunities conferred upon gratuitous trustees by the Trusts Acts. Where a person is appointed under a trust deed to be trustee and executor, his resignation of the office of trustee infers, "unless where otherwise expressly declared," his resignation also as executor (30 & 31 Vict. c. 97, s. 18).

Executors, like trustees, may act by a majority. "When co-executors differ in opinion regarding any matter concerning either the management or the realisation of the executry estate, the opinion and desire of the majority must prevail" (per Ld. Pres. Inglis in *Mackenzie*, 1886, 13 R. 510). But "if a majority of co-executors were insisting upon doing something that was likely to injure or dilapidate the estate, such as to bring it to sale in such a way as plainly to prejudice the interest of the executors as a whole, or the interest of the beneficiaries, the Court might be induced to interfere with their doing so, and to protect the minority against the majority" (*ib.*). Thus, where a majority of executors had made an agreement with a person who claimed to be the widow of the deceased, whereby, in consideration of a sum of money to be paid to them, they undertook to



do all in their power to vest the estate of the deceased in her, the Court took the administration out of their hands, and appointed a judicial factor (*Birnie*, 1891, 19 R. 334). But, as co-executors hold the office *pro indiviso*, they must all concur in suing a debtor of the estate. Where, however, one of the executors refuses to concur, "the pursuit will be sustained without him, and he may be excluded by a process before the Commissaries on that ground" (*Stair*, iii. 8. 59). So one executor, *qua* next of kin, has been held entitled to sue for her share another executor who was alleged to be a debtor to the estate (*Torrance*, 1841, 4 D. 71). But where five out of six executors had settled an action, and the sixth did not oppose, though he was not a party to the minute of settlement, he was held to have no title to sue, in an attempt which he made some time afterwards to waken the action (*Scott*, 1897, 34 S. L. R. 304). Where the testator has appointed one of his executors to be a *sine quo non*, and that executor declines the office, the other executors may act, unless the deed clearly shows the testator's intention to have been that the whole appointment should fall on the failure of the specially-selected executor (*Forbes*, 1808, Mor. App. *Solidum et pro rata*, No. 3; 5 Pat. 226). The appointment of a *sine quo non* gives the person so appointed a right to veto the acts of his co-executors; but as, at the same time, his wishes cannot prevail against the wishes of a majority of the executors, such an appointment is inconvenient, and may lead to a deadlock in the administration of the executry.

An executor has a title to carry on any action which has been instituted by the deceased, provided that the right in respect of which the action is maintained has been transmitted to him. An action of transference was formerly necessary in order to enable him to do so, but now it is competent for him to lodge a minute craving to be sisted in place of the deceased (30 & 31 Vict. c. 108, s. 96). Where the deceased was pursuer, his representatives are bound, at the defender's request, to sist themselves, or decree will be given which will be effectual against the estate which they administer. The executor cannot, however, institute an action which is personal to the person whom he represents, such as an action for divorce (see *Fraser, H. & W.* 1146), or an action for damages for personal injury (*Bern*, 1893, 20 R. 859), except where he avers patrimonial damage (*Auld*, 1874, 2 R. 191): but it appears that where there has been litiscontestation, and where patrimonial interests are involved, he may carry on such an action (see *Ritchie*, 1874, 1 R. 826; *Neilson*, 1853, 16 D. 325; *Wood*, 1892, 19 R. (H. L.) 31). In a recent case, an opinion was expressed that an executor would be entitled to carry on an action involving personal status, such as a declarator of marriage (per *Ld. Young* in *Borthwick*, 1896, 34 S. L. R. 164). He is at all events entitled to carry on such an action where there is an alternative conclusion for damages, if he limits the action to that conclusion (*Borthwick*, *ut supra*). By statute, the children or next of kin of the defender in an action of divorce may appear and state defences (24 & 25 Vict. c. 86, s. 10).

It has been said that an executor is *eodem persona cum defuncto*, but such a statement is inaccurate and misleading. "It is true that for many purposes an executor stands exactly in place of the deceased, and that questions between him and others, say a creditor of the deceased, may very properly be dealt with on the same grounds and considerations in fact and in law as they would have been with the deceased himself" (per *Ld. Young* in *Gray*, 1895, 23 R. 205). But his right to deal with the estate is limited by his fiduciary character, and his liability is limited by the amount of the estate and his proper administration thereof. He is not strictly a debtor



to the creditors of the deceased. "The executors are only debtors for a due administration of the executry estate, and to pay each creditor what shall, on such administration, be found to be his share. Executors are only trustees, and responsible for no more than other trustees, namely, a due realisation of the trust estate, and distribution of it among those having the beneficial right to it" (per Ld. Young in *Gray, ut supra*). So, where executors had lodged part of the executry estate which they had ingathered in a bank, it was held that there was no *concursus debiti et crediti* to entitle the bank to withhold payment of the money in respect of a debt due to them by the deceased (*Gray, ut supra*).

The word "executors" is frequently used as denoting the heirs *in mobilibus* of the deceased, and a bequest to "executors" is interpreted to mean a bequest to those who would have succeeded to the moveable estate, under the Intestate Moveable Succession Act of 1855, had the deceased died intestate (*Nimmo*, 1864, 2 M. 1144; *Stodart*, 1870, 8 M. 667; *Ewart*, 1870, 9 M. 232).

As to questions of relief between heir and executor, reference is made to the title HEIR AND EXECUTOR. See also COLLATION; DISCUSSION.

[*Ersk.* iii. 9; *Stair*, iii. 8; *Mackenzie*, iii. 9; *Kames's Stat. Law Abridg.*, voce "Executor"; *Kames's Elucidations*, art. 16; *Bell, Prin.* 1870-1902; *Bell, Com.* ii. 81; *Bell, Conv.* 251. 417, 555, 927, 1119; *Menzies, Lectures*, 482; *McLaren on Wills and Succession*, 853-879; *Howden on Trusts*, 166-203; *Alexander, Commissary Practice*; *Currie on the Confirmation of Executors*.]

See CONFIRMATION OF EXECUTORS; EXECUTOR-CREDITOR; EIK TO A CONFIRMATION: AD OMISSA VEL MALE APPRETIATA; INVENTORY; TESTAMENT; VITIOUS INTROMISSION.

**Executor-Creditor.**—Where no one comes forward to expedite confirmation to the moveable estate of a deceased person, either as executor-nominate or as next of kin, it is open to any creditor of the deceased to be confirmed as executor-creditor to so much of the estate as will enable him to make good his debt.

Confirmation as executor-creditor can only be taken out by a creditor whose debt is constituted. If the debt is already constituted at the date of the debtor's death by writing or decree, the creditor may apply for decerniture and confirmation at once. The decree of an English Court constituting the debt is sufficient (*Stiven*, 1868, 6 M. 885). The confirmation, not the decree-dative, vests the right to the estate in him (see *Cust*, 1775, Mor. 2795; *Willison*, 1840, 3 D. 273). Where the debt has not been constituted in the deceased's lifetime, the creditor may "charge the defunct's nearest of kin to confirm executor to him within twenty days after the charge given; which charge, so execute, shall be a passive title against the person charged, as if he were a vitious intromitter, unless he renounce; and then the charger may proceed to have his debts constituted, and the *hereditas jacens* of moveables declared liable by a decree *cognitionis causa*, upon the obtaining whereof he may be decerned executor-dative to the defunct, and so affect his moveables in the common form" (Act 1695, c. 41; see *Forrest*, 1863, 1 M. 806; *Davidson*, 1867, 6 M. 151).

An executor-creditor need not expedite confirmation to the whole moveable estate of the deceased, but his confirmation "may be limited to the amount of the debt and sum confirmed, to which such creditor shall make oath" (4 Geo. IV. c. 98, s. 4). The oath required by the Statute is made to the inventory given up, not to the debt (*Greig*, 1837, 15 S. 697).

The creditor must, when he makes his application, give up an inventory of the whole estate, for the purposes of the stamp duties; but by limiting his confirmation to the amount of the debt due to him, he limits his responsibility for the administration of the estate, and the amount of caution which he must find. The procedure is otherwise the same as in the ordinary case of the confirmation of an executor-dative. This is the only case in which partial confirmation is competent. Notice must be given of the application for confirmation in the *Edinburgh Gazette*, and anyone who has a preferable claim to be confirmed may, within nine days, lodge objections, and exclude the creditor from the office. Any other creditor of the deceased, also, who cannot find other estate to which he may be confirmed, is entitled to be conjoined in the office with the first creditor. Confirmation as executor-creditor operates as a step of diligence, and its effect is to create a burden or *nevus* upon the subject confirmed, leaving that subject in the *hereditas jacens* of the deceased debtor, subject to the burden (per Lord Curriehill in *Smith*, 1862, 24 D. 1169). There can thus be several confirmations to the same subject, either conjoined or successive. By A. S. 20 February 1662, all creditors doing legal diligence within six months of the debtor's death, "by citation of the executors and intromitters with the defunct's goods, or by obtaining themselves decerned and confirmed as executors-creditors, or by citing of any other executors-creditors confirmed," are entitled to rank *pari passu* upon the estate. But creditors thus coming in late must bear a proportion of the expense incurred by the creditor first confirmed. Where one creditor has been decerned joint executor-creditor with another, he is bound to concur in applying for confirmation (*Willison*, 1840, 3 D. 273).

Creditors of the next of kin of the deceased may, if he "lyes out and doth not confirm," claim to be confirmed as if they were creditors of the deceased (Act 1695, c. 41), but their diligence is postponed to that of creditors of the deceased done within a year and day of the death.

Where an executor-creditor expedes confirmation to the whole estate of the deceased debtor, estimating it at a certain value, and the estate turns out to be of a greater value, a second confirmation, estimating the estate at its true value, has a preference over the first as regards the surplus (*Smith*, 1862, 24 D. 1142).

An executor-creditor is, like any other executor, liable in exact diligence to make good the amount of estate to which he has been confirmed (A. S. 14 November 1679): and if he is confirmed to more than the amount of his debt, he must account for the surplus to those interested in the estate.

A confirmation as executor-creditor is preferable to an arrestment, though the arrestment is prior in date: for the confirmation is a completed diligence, whereas the arrestment, until decree of furthcoming has been obtained, is inchoate (*Wilson*, 1823, 2 S. 430). A decree of preference in a multiplepinding does not exclude the diligence of an executor-creditor (*Anderson*, 1831, 10 S. 49); nor is that diligence excluded by a foreign title of administration which has not been confirmed in Scotland (*Clarke*, 1810, Hume, 175). Where a special legacy has been bequeathed, or where special subjects have been assigned to a donee for a particular purpose, these are not affected by the confirmation of an executor-creditor (*Bell*, 1831, 9 S. 266: *Innerarity*, 1840, 2 D. 813).

By the Bankruptcy Act of 1856 (19 & 20 Vict. c. 79, s. 30), it is declared to be incompetent for any creditor, after the date of the first deliverance on the petition for sequestration, to be confirmed as executor-creditor; and sec. 110 of the same Act provides that, where the estates of

a deceased debtor are sequestrated within seven months of his death, a confirmation as executor-creditor is of no effect in competition with the trustee, except in so far as to give the creditor a preference for the expense incurred by him in obtaining confirmation.

[Ersk. iii. 9. 34, 35; Stair, iii. 8. 63; Bell, *Prin.* s. 1895; Bell, *Com.* ii. 83; Kames's *Elucidations*, art. 16; Bell, *Conveyancing*, ii. 1135; McLaren on *Wills*, 853; Currie on the *Confirmation of Executors*, 87.]

See EXECUTOR; CONFIRMATION OF EXECUTORS; DILIGENCE.

**"Executors."**—The word executors is sometimes used with a wider signification than merely including those who have been confirmed executors, being extended to all who have a right, whether the succession be testate or intestate, to claim the office of executor, if they think proper; as in the expression in a bond, "heirs, executors, and representatives whomsoever" (Ersk. *Inst.* iii. 9. 1). When used as a *designatio personarum*, it applies to executors nominate or dative as the case may be (McLaren, *Wills*, s. 1397). A bequest to A., whom failing his executors and representatives whomsoever, is carried, A. being dead, to his executors nominate for the purposes of his trust disposition and settlement (*Scott's Executors*, 1890, 17 R. 389; *Dore*, 1827, 5 S. 734). But if the words "heirs and executors," or "executors and next of kin," are used, the word executors receives a construction consistent with the associated words, and is limited to executors claiming by a beneficiary title (McLaren, *Wills*, s. 1398; *Lawson*, 1826, 4 S. 384; *affd.* 2 W. & S. 625; *Stoddart's Trs.*, 1870, 8 M. 667).

**Executry.**—The whole moveable goods and rights of a deceased person are comprehended under the term executry, including not only that which is proper to the executor by his office or succession, but also what falls to the relict, children, next of kin, legatees, and creditors. (Stair, iii. 8. pr.; Ersk. *Inst.* iii. 9. 1; *Dore*, 1827, 5 S. 734.)

**Exercitoria, Actio.**—This was one of the prætorian actions, by which principals were made directly liable to third parties for contracts entered into by their agents. It applied particularly to the case of contracts made by the captain of a vessel as the agent of the owner or charterer of the vessel (*Inst.* iv. 7. 2; D. 14. 1. 1. 1). The authority of the captain extended generally to all contracts relating to the ship, its repair, and its freight (D. 14. 1. 1. 7). His contracts, however, did not bind his principal, and the *actio exercitoria* did not lie, if he exceeded his powers as defined by his commission. The *actio exercitoria* lay equally, whether the captain was a free person or a slave. (*Inst.* iv. 7. 2; *Gaius*, 4. 71; D. 14. 1. 1).

**Exhibition, Action of.**—The action of exhibition may be either a principal or an accessory action. In the former case, it is used for the purpose of compelling delivery of documents in which the pursuer has a right of property or custody: in the latter, it is employed for the purpose of compelling production, with a view to inspection, of documents in which he is interested, but of which he does not claim either the property or the custody.



*EXHIBITION AND DELIVERY.*—This is an independent action founded upon the pursuer's sole right of property in the documents, or on his exclusive right to their custody when he is jointly interested with others in the subject with which they deal. The action may be, and usually is, raised in the Court of Session, but its purpose may often be more speedily and cheaply attained by presenting a summary petition to the Sheriff, unless the right to the possession of the documents involves a question of heritable title not competent in the Sheriff Court. Under the same limitation, the question may be raised in the Sheriff Court by way of ordinary action (Dove Wilson, *Sh. Ct. Pr.* 421). The pursuer must be able to instruct a right of property in, or to the custody of, the documents (*Campbell*, 1824, 2 S. 615; revd. 1826, 2 W. & S. 440), and he cannot demand a general exhibition of writings for the purpose of ascertaining whether any exist which may support his claim (*D. of Hamilton*, M. 3966). He must condescend upon the special writings of which he requires exhibition. If he shows a right in the documents, it is no answer that he would gain no benefit from them (*L. Campbell*, M. 3973). The action of exhibition is a real action, and may be pursued against any person who is in possession of the documents called for. When the Court is satisfied that they should be produced, the proper course is to appoint them to be exhibited in the hands of the Clerk of Court (*Clerk*, 1880, 8 R. 81). A trustee in bankruptcy is armed with sufficient powers, under the Bankruptcy Statutes, to compel production of the debtor's documents, and does not require to have recourse to an action of exhibition (*Selkirk*, 1880, 8 R. 29; Goudy, *Bankruptcy*, 251).

[See *Stair*, i. 7. 14, iv. 33. 1; *More's Notes*, li.; *Ersk.* iv. 1. 52; *Jurid. Styles*, iii. 20; *Dickson, Evidence*, s. 1378.]

*EXHIBITION AD DELIBERANDUM.*—The right which our older law gave to the heir to deliberate for a definite period whether he would take up the succession of his ancestor or not has become of little practical consequence, owing to the provisions of the Conveyancing (Scotland) Act, 1874. A personal right to the estate now vests in the heir without service (s. 9); and he is no longer liable for the debts of his ancestor beyond the value of the estate to which he succeeds, or of his intrusions (s. 12). In the days, however, when entry as heir carried with it universal liability for the ancestor's debts, it was a matter of great consequence for the heir to determine whether the succession was *damnosa* or *lucrosa*. For this purpose he was at one time allowed a year and a day after the ancestor's death to deliberate (the *annus deliberandi*), which period was afterwards reduced to six months; and by means of the action of exhibition he might compel the production, for the purpose of inspection, of all writings granted to or by his ancestor, and whether perfected by sasine or not, with the view of ascertaining the position of the estate (see APPARENT HEIR, where the more recent cases are quoted). He might raise the action at any time before his actual entry as heir, even although after the expiry of the *tempus deliberandi*; and it was competent against all persons in possession of the writs required, whether relations or strangers (*Taitzifer*, M. 4006; *Buchanan*, M. 4010). For form, see *Jurid. Styles*, iii. 21. The usual defences to the action were that the pursuer was already entered, and so had no occasion to deliberate; that he was excluded from the succession by some deed of his ancestor's; that he had been charged to enter by the creditor pursued, and had renounced, though this was not a good defence in the mouth of any other creditor; or that the writs were recorded in a public register in Edinburgh and therefore accessible to the heir. But he was not bound to follow them to registers elsewhere.



[See Stair, iv. 33. 4; Ersk. iii. 8. 56; Bankt. iii. 4. 66, 5. 7; Bell, *Prin.* s. 1688; Dickson, *Evidence*, 1380; Mackay, *Prac.* i. 285, 365; *Manual*, 130, 178.]

*EXHIBITION AD PROBANDUM*.—This was an accessory action used for the purpose of recovering writings in the hands of third parties, to be produced *in modum probationis* in a depending process. The action is now almost entirely unknown in practice, having been superseded by the use of incident diligences, granted in the course of the principal process, against the persons in possession of the writings called for. It is, however, still competent, and may be used for the purpose of getting at documents which cannot be recovered by diligence (*Campbell*, 1869, 7 M. 759, Ld. Barcaple's note). See TRANSMPT.

[Stair, iv. 33. 2, 41. 5; Ersk. iv. 1. 52; Dickson, *Evidence*, s. 1381; Mackay, *Practice*, i. 365, *Manual*, 178; Shand, *Practice*, i. 369.]

See COMMISSION, PROOF BY; HAVERS.

**Exhumation.**—See BURIAL: DEAD BODY; VIOLATING SEPULCHRES.

**Exoneration and Discharge.**—When one person is indebted to another in a specific sum of money or a specific piece of property, a simple receipt by the creditor is sufficient to discharge the debtor of his debt. It is different, however, when one person has intromitted with the property beneficially belonging to another person. Here the amount due by the intromitter at the close of his intromission depends upon the character of that intromission, and he requires something more than a receipt for a specific sum to protect him from claims by the beneficial owner. The person beneficially interested must exoner him of his action in intromitting with the former's property; and on payment of the sum found due as the result of his intromission, he must obtain a discharge by the beneficial owner, acknowledging not only the receipt of the sum so brought out, but that that sum is all that the beneficial owner can legally claim. The most common and typical example, in practice, of an intromitter requiring exoneration and discharge, is the case of the trustee; and this case will be first dealt with. Of the various beneficiaries under a trust, some may be required to grant only a simple receipt, while others may be required to grant a discharge exonerating the trustees of their actings and intromissions. Amongst the latter are residuary legatees, and also legatees (*Fleming*, 1861, 23 D. 443) and debtors of the defunct, where the trust estate fails to meet their specific claims, and only a dividend can be offered. Amongst the former are the debtors of the defunct and legatees where their claims are met in full.

A presumption of exoneration may be instructed from facts and circumstances. Thus it was held that a claim by an assignee of a beneficiary, made after the lapse of several years, was barred by an implied exoneration, where the circumstances pointed to the original beneficiaries having been satisfied with the actings of the trustees (*Stuart*, 1836, 14 S. 412). Where the disponent in a trust, by absolute disposition and back-bond, was in possession of the back-bond, this was held to imply his exoneration (*Charteris*, 1712, Mor. 11413). But a minute not signed by the beneficiary, though relating his concurrence in the action of the trustees, is not enough to instruct exoneration (*Cameron*, 1891, 18 R. 728).

*Exoneration and Discharge by Beneficiaries.*—To the extent of his own

beneficial interest, every beneficiary of full legal capacity, whose interest is not either merely alimentary or protected by the provisions of a marriage contract, can exoner and discharge the trustee. Hence a discharge by all those beneficially interested, subject to the same exceptions, effectually exoner and discharges the trustee of all his actings and intronmissions in virtue of his office up to the date of the discharge. It does not incapacitate a beneficiary that he is deaf and dumb (*Craigie*, 1837, 15 S. 1157). Incapacity from physical defects only arises where he cannot be communicated with (*Kirkpatrick*, 1853, 15 D. 734). Where a truster directed his trustees to hand over the residue of his estate to a beneficiary on his coming of age, he also directed that, in the event of the beneficiary "being under age at the time appointed for denuding of this trust, then this trust right and disposition shall subsist and continue until he or she shall be of age, and thereafter until the said trustees are validly exoner and discharged." When the residuary beneficiary came of age, the trustees proceeded to denude in his favour: but before the formal deeds were completed the beneficiary died, leaving a pupil as his heir. The Court here held that the estate must be taken to have been actually transferred to the deceased beneficiary, and that the fact that the conveyance to him was formally incomplete did not prevent them being validly exoner by the representatives of the deceased (*Stainton*, 1850, 12 D. 571). In the case of such a discharge by a pupil and his tutor, the Court have interposed their authority to the exoneration of the trustees (*Stainton*, 1850, 12 D. 571, interlocutor and opinion of Ld. Moncreiff, last sentence). The mere receipt for a sum of money is different—payment to the tutor and a receipt granted by him sufficiently discharges the paying trustee, leaving the pupil to proceed against the tutor if the sum is not forthcoming (*Murray's Trs.*, 1887, 15 R.).

*Exoneration and Discharge by Nominee of Truster.*—As the truster, in a gratuitous trust, is entitled to put such conditions to his gift as seems good to him, he can nominate someone who is not a beneficiary to exoner and discharge the trustees, and a discharge by such person is a valid exoneration of the trustees without any intervention on the part of the beneficiaries. For instance, where the truster directed that the accounts of the trust should "be annually produced to, and examined by, an accountant of character and experience, to be chosen by the said trustees or trustee, and after being examined and passed by him shall be fitted and docketed by the said trustees or trustee, and which shall operate as a complete exoneration to them or him accordingly," a discharge obtained in the manner indicated was held to bar objections by the beneficiaries (*Tod*, 1842, 4 D. 1275). In a trust of a permanent nature this is the recognised method of exoner the trustees. Thus, in a charitable trust, the truster directed the trustees, who were the minister and kirk session of a parish, to submit an account of their intronmissions, at least annually, to the presbytery, and be empowered the presbytery, if they were satisfied, to exoner the trustees of their intronmissions to date (*Shepherd*, 1855, 17 D. 516).

*Exoneration and Discharge by Co-Trustees.*—By the Trusts Act, 1867, it is enacted that, in all trusts affected by the Act, "the trustees shall have power to do the following acts, where such acts are not at variance with the terms or purposes of the trust, and such acts when done shall be as effectual as if such powers had been contained in the trust deed, namely, . . . (2) To discharge trustees who have resigned, and the representatives of trustees who have died" (30 & 31 Viet. c. 97, s. 2 (2)). The effectiveness of this discharge to exoner the trustees who have gone out of the trust has been questioned (3 S. L. T. p. 139), but the expression of the statutory power does not seem

to admit of misinterpretation, and the declaration of the Statute must be accepted as the last word on the subject. Of course, the *bona fides* of the whole transaction must be unquestionable.

*Exoneration and Discharge by the Court.*—1. Under Statutory Powers.—In certain circumstances the Court is authorised and required by Statute to discharge trustees. The Trusts Act, 1867, enacts that where trustees cannot obtain a discharge “from the remaining trustees, and when the beneficiaries of the trust refuse, or are unable, to grant a discharge,” resigning trustees may apply to the Court for a discharge (30 & 31 Vict. c. 97, s. 9). It has recently been decided by Ld. Low (Ordinary) that the conditions precedent to the exercise of the power by the Court are alternative, and not cumulative,—that the power of the Court to discharge under the Statute only arises where neither a discharge by the remaining trustees nor one by the beneficiaries can be obtained, and does not come into existence because a discharge both from the resigning trustees and from the beneficiaries cannot be had (*Matthews’ Trs.*, 1894, 2 S. L. T. 131).

2. Under Common Law Powers.—Trustees may be incidentally exonerated and discharged by the Court in any proceedings before it where all parties are represented. There is, however, a well-known form of process for bringing all parties into Court for the sole purpose of enabling the trustees to get a judicial discharge. This is by the raising of an action of multiplepoinding, which Ld. Cunninghame called “the established mode of getting a discharge” (*Dunbar*, 1850, 13 D. 54, at p. 61). An action of division and sale has been held not to be a competent alternative method (*Kennedy*, 1885, 12 R. 1026). By the form of process known as a multiplepoinding, the trustees consign the funds in Court, and take their discharge from the Court, after calling all parties interested before it to state their claims on the fund and their objections to the intromissions of the trustees. (For the case of trustees administering a trust under two deeds, see *Cumming*, 1834, 12 S. 508.) The ordinary use of the process of multiplepoinding is to protect the holder of a fund who is sued by different claimants thereon. He is said to be subject to double distress. In the ordinary case it is incompetent to raise the action unless such double distress exists. In the case of a trustee seeking exoneration, however, an exception is made. Something short of actual double distress will entitle him to raise the action for his own protection, and with the purpose of obtaining judicial exoneration (*Taylor*, 1836, 14 S. 817, per Ld. Pres. Hope, at pp. 819–20). “It is not necessary,” says Ld. Fullerton, “that there should be actual competition; it is enough that there is a possibility of competition” (*Dunbar*, 1850, 13 D. 54, p. 60; cf. a case of doubtful representation of a person who had disappeared (*Davidson*, 1895, 3 S. L. T. 249); but see *Fraser’s Eccentric*, 1893, 20 R. 374). Where there is any difficulty in the construction of the trust deed, this is always recognised as a ground on which trustees are entitled to raise a multiplepoinding, to expiscate the matter with safety to themselves (*Mackenzie’s Trs.*, 1895, 22 R. 233, per Ld. McLaren, p. 236; cf. *Cundell*, 1832, 2 S. 80). Where the trustee has been unable to get a discharge from the beneficiaries, whether owing to their unwillingness or to their incapacity, he can competently raise a multiplepoinding for obtaining his exoneration and discharge from the Court (*Dunbar*, 1850, 13 D. 54, per Ld. Fullerton, p. 60; cf. Ld. Adam in *Mackenzie’s Trs.*, 1895, 22 R. 233, pp. 235–6, followed in *Gordon*, 1895, 2 S. L. T. 540). He is entitled to an absolute discharge; and where a trustee was offered a partial discharge and security for any demands that might be made on him thereafter, he was held to be entitled to refuse to pay over the trust funds on these



conditions (*Elliott's Trs.*, 1828, 6 S. 1058: cf. *Taylor*, 1836, 14 S. 817). Unreasonable delay in granting an extrajudicial discharge entitles a trustee to raise a multiplepinding for his judicial discharge (*Fotheringham*, 1852, 14 D. 427). The Court has refused to grant a judicial discharge on an *ex parte* application therefor, even though the truster had himself directed such a form of procedure for the purpose, and declared it to be binding on the beneficiaries (*Dundas*, 1869, 7 M. 670). Official public trustees have, however, been discharged on petition at common law, the Court being satisfied that it had all the parties interested before it as petitioners (*Rosebery*, 1892, 29 S. L. R. 865).

*Effect of Exoneration and Discharge.*—When trustees have been validly exonerated and discharged, they cannot be afterwards called to account for intromissions covered by the discharge while it stands, and it can only be challenged in a formal action of reduction. The question of its validity cannot be competently raised in an action of count and reckoning against the trustees (*MacPherson*, 1841, 3 D. 1242, per L. J. C. Boyle, at p. 1260). Something less, however, than active fraud or misrepresentation on the part of the trustees will afford ground for a reduction. Where the beneficiary has acted in ignorance of his rights, the discharge will be set aside; but the challenge must be made within a reasonable time (*Robertson*, 1834, 12 S. 875), and specific facts averred which were not in the knowledge of the beneficiaries at the time the discharge was granted (*Campbell*, 1822, 1 S. 413 and 484). See also ERROR. Where a discharge has been granted before the execution of the trust is formally completed, its validity depends on that formal completion. Thus, where trustees took a heritable bond in favour of the beneficiaries and got their discharge, but by their delay in taking sasine allowed another person to take infestment on another bond over the same property, the discharge was held not to protect the trustees (*Mayne*, 1835, 13 S. 870). A judicial exoneration in a multiplepinding only covers intromissions to the date of the raising of the action, and the sanction of the Court must be obtained for all intromissions had during the currency of the action, if it is desired to make the decree of exoneration cover these intromissions also (*Barnet's Trs.*, 1872, 10 M. 730). A joint discharge by beneficiaries to trustees does not discharge the claims of the beneficiaries *inter se* (*Halbert*, 1851, 13 D. 667); and warrandice granted in such a discharge is presumed to be warrandice on the part of each beneficiary of the discharge of his own claims only, at least “where all parties are present and each uplifts his own separate share and no more” (*M'Farlane*, 1835, 13 S. 725, per Ld. Mackenzie, at p. 734). The Trusts Act of 1884 extends the statutory powers of trustees proper to tutors, curators, and judicial factors, including a factor *loco tutoris*, factor *loco absentis*, and a *curator bonis* (47 & 48 Vict. c. 63. s. 2). Persons filling these offices are therefore empowered to take advantage of the statutory procedure for obtaining discharge open to trustees under the Trusts Acts. With the exception of tutors and curators, these offices are filled by officers of the Court appointed to administer the estates in their charge under its supervision, and in practice they get their discharge from the Court by petition therefor, either to the *nobile officium* of the Court where the appointment was made by the Court in that character, or under the Statutes authorising their appointment. The details of the procedure will be found under the special article dealing with each of these offices.

**Expede.**—This word, which is said to be derived from the French verb *expédier*, signifies the process by which the principal copies of letters,



decrees, or other judicial writs are written out, signeted, sealed, or otherwise completed. According to the old practice, after a bill of suspension or advocacy had been passed in the Bill Chamber, letters of suspension or advocacy were written out and signeted, and this was termed *expeding* the letters. It is no longer necessary to expedite such letters (1 & 2 Vict. c. 86, ss. 4, 6; 31 & 32 Vict. c. 100, ss. 64, 65). The word is still applied to the process by which the service of heirs is effected, the decree of service being said to be *expede* before the Sheriff pronouncing it. It used formerly to be applied also to the elaborate process for obtaining a Crown charter, but the forms were, to a large extent, simplified by the Crown Charters Act, 1847 (10 & 11 Vict. c. 51), and the term now used is *passing* the charter.—[Ross, *Lect.* i. 236; Bell, *Conveyancing*, 757.]

**Expenses.**—*EXPENSES FOLLOW SUCCESS.*—Within certain limits and subject to certain conditions, the awarding of expenses lies in the discretion of the Court. On this branch of law, the best-defined rule with which we have to do is that “expenses follow success.” As to what is success, that is a matter for the Court to determine. That litigant is the successful party who, in the opinion of the Court, obtains a substantial proportion of what he was litigating for. Such a party will be awarded full expenses. He will be awarded expenses even where, in arriving at its decision, the Court overturns a prior judgment on a point of law (*Crawford*, 1862, 24 D. 357). Where, however, the Court is of opinion that the expense of an action, or part of an action, has been caused by the improper conduct of the party ultimately successful, it will either award these expenses to the unsuccessful party or give no expenses to either side (*Campbell*, 1868, 6 M. 632; *Robb*, 1875, 2 R. 698; *Orr*, 1872, 10 S. L. R. 81; *Campbell*, 1895, 3 S. L. T. 246; *Bannerman’s Trs.*, 1896, 3 S. L. T. 470); dilatory procedure (*Earl of Minto*, 1873, 1 R. 156), unnecessary or imperfect pleadings (*Johnston*, 1844, 6 D. 410; *Solway Junction Ry.*, 1873, 10 S. L. R. 442; *McEwan*, 1865, 3 M. 798), improper form of action (*Lyell*, 1834, 13 S. 94), have been held good grounds for refusing expenses to the successful party. Where, too, any procedure is considered by the Court to be unnecessary, the party who is the cause of it may be found liable in the expense of it (*Milne Home*, 1882, 9 R. 924; *Lee*, 1882, 10 R. 230; *Sinclair*, 1882, 10 R. 45). By A. S. 15 July 1876, it is provided that: “Notwithstanding that a party shall be found entitled to expenses generally, yet, if on the taxation of the account, it shall appear that there is any particular part or branch of the litigation in which such party has proved unsuccessful, or that any part of the expense has been occasioned through his own fault, he shall not be allowed the expense of such parts or branches of the proceedings.” Where a defender pled incompetency, but did not reclaim against an interlocutor finding the action competent, in consequence of which a proof was allowed, and subsequently was successful in the Inner House on the question of competency, it was held that if the pursuer desired to claim the expenses of the proof under the above section, he must do so in Court and not before the Auditor, such a question being one proper for the Court to decide when disposing of the motion for expenses (*Welsh*, 1894, 21 R. 769). Where a long proof was held by a Sheriff, a great deal of which on both sides was considered useless by the Court, the Court disallowed one-half the expense of it, and stated that the precedent thus laid down would be followed in similar cases (*Ralston*, 1878, 5 R. 671). Delay in producing documents has frequently been a ground for refusing expenses (*A. B. v. C. D.*, 1839, 1 D.

610; Mackay's *Practice*, vol. ii. p. 535). Where the unsuccessful party is held justified in litigating, he may have his expenses awarded to him (*Dunlop*, 1850, 12 D. 518; *Kerr*, 1854, 17 D. (H. L.) 11). In the event of divided success, the Court will either award no expenses to either party (*Cuthbert*, 1888, 16 R. 259), or give modified expenses to the more successful party (*Keiller*, 1886, 14 R. 191); this rule, however, does not hold in jury trials (see *Expenses in Jury Trials*); nor does it hold where the pursuer has two grounds of action, and is successful in one and unsuccessful in the other, unless it can be shown that extra expense has been caused to the defender by the plea in which the pursuer was unsuccessful (Mackay's *Practice*, vol. ii. p. 530). Where the unsuccessful party can show that he was successful in one part of the case, and that there was some special expense incurred in connection with it, he will be awarded that expense (*Johnston*, 1856, 18 D. 1234; *Dean*, 1873, 11 M. 759; *Stoppel*, 1850, 13 D. 345. But see *Donaldson*, 1 Rob. Ap. 226). Where a pursuer, who was only partially successful, was found "entitled to two-thirds of the expenses as the same shall be taxed," it was held that the Auditor had acted rightly, before deducting the one-third, in disallowing all expenses clearly connected with the portion of the case in which the pursuer had failed (*Arthur*, 1895, 22 R. 904).

*MODIFICATION OF EXPENSES.*—In certain instances the expenses awarded to the successful party may be modified, or no expenses awarded to either party (*Goldie*, 1882, 10 R. 174). Expenses may be refused to the successful party, or they may be modified on the ground of misconduct (*Raeburn*, 1882, 10 S. 761; *Ewart*, 1882, 10 R. 163; *Elliot*, 1895, 33 S. L. R. 495; *Shepherd*, 1896, 3 S. L. T. 401). This is not uncommon in divorce cases (*Collins*, 1882, 10 R. 250; *Edward*, 1879, 6 R. 1255). Where the Court held that the successful party intentionally led the unsuccessful into Court, expenses were given to neither party (*Manners*, 1872, 10 M. 520). Where there has been unnecessary procedure on both sides, the Court may give each party the expense of the particular details in which he is successful (*Buttery*, 1877, 5 R. 58; *Lowrie*, 1849, 12 D. 167). Where the award will infer great hardship on the unsuccessful party, it is in the power of the Court to modify (*Trail*, 1870, 8 M. 579). The Court will, as a rule, modify very substantially when a case has been raised in the wrong Court. The successful party will, as a rule, be allowed his expenses on the lower Court scale only (*Wilkie*, 1884, 12 R. 219; see also *Murray*, 1885, 12 R. 945; *Gibson*, 1879, 6 R. 890; *Walkers*, 1884, 11 R. 1101; *Sutherland*, 1885, 23 S. L. R. 210; *Tod*, 1889, 27 S. L. R. 169). Again, where the ground of judgment is suggested by the Court, the Court may modify (*Bartsch*, 1895, 3 S. L. T. 325; *Smith*, 1875, 2 R. 601), or award expenses to the unsuccessful party (*Arnott*, 1872, 11 M. 92), or to neither party (*Fairbairn*, 1885, 13 R. 81). So, too, when the ground of judgment is not argued in the Court of first instance (*Andrews*, 1887, 14 R. 568; *North of Scotland Banking Co.*, 1882, 10 R. 217), nor mentioned on record (*Woodhead*, 1877, 4 R. 469; *Mitchell*, 1883, 10 R. 982). When the objection is not taken tempestive, as, for instance, when an action is thrown out on a preliminary plea, but the plea is not stated until the case has been argued on the merits, the successful party will not be awarded his expenses (*Steele*, 1879, 7 R. 192; *Ross*, 1878, 15 S. L. R. 438; *Watt*, 1865, 3 M. 730; see also *M'Kenzie*, 1830, 8 S. 526; *Dickie*, 1828, 6 S. 637). When there has been incompetent or irregular procedure, even though the fault lies with the judge, the expense of it will not be allowed to the successful party (*Dick & Stevenson*, 1880, 7 R. 778; *Sneddon*, 1876, 3 R. 868).

There are certain cases where the Court, in order to avoid the expense of an audit, fixes a sum to cover all expenses: the fixing of this sum is called modification (*Hare*, 1882, 9 R. 910). This course is followed only when the expense is small (*Macfarlane*, 1860, 22 D. 1500; *Donaldson*, 1873, 11 M. 347), or when dealing with the incidental steps of an action (*Ireland*, 1882, 10 R. 53; *Craig*, 1871, 9 M. 715), or in suspensions of convictions (*Galt*, 1873, 11 M. 971; *Clyne*, 1887, 14 R. (J. C.) 22). The Lord Ordinary may, it is thought, modify expenses in this fashion whenever it seems proper to him (*Hare*, 1882, 9 R. 910), but he should use his power sparingly (*Clarke*, 1888, 15 R. 670). The Court will be slow to interfere with a modification by the Lord Ordinary (*Maeintosh*, 1838, 1 D. 211), unless it considers that a substantial mistake has been made (*Harvey*, 1845, 7 D. 604; *Minto*, 1837, 15 S. 1094). Where an interlocutor awarded expenses, but reserved as to modification and was not reclaimed, and subsequently another interlocutor was issued after counsel had been heard on the question of modification, it was held that the latter could be reclaimed against within twenty-one days (*Taylor's Trs.*, 1896, 4 S. L. T. 15; *Crellin*, 1893, 21 R. 21).

**RESERVATION OF EXPENSES.**—It is always competent for the Court to reserve the question of expenses while dealing with the merits, in which case they may be decerned for in a subsequent interlocutor (*Bannatyne's Trs.*, 1872, 10 M. 317). Expenses are as a rule reserved when a remit is made to an accountant (*Semple*, 1888, 15 R. 810); also when the Inner House decides certain points in a case, and remits the cause to the Lord Ordinary or Sheriff to proceed therein, it usually reserves expenses, and devolves on the Lord Ordinary or Sheriff power to determine all questions thereanent (*Tait's Trs.*, 1886, 13 R. 1104; *N. B. Ry. Co.*, 1881, 9 R. 97). Even when expenses have been awarded, the Court may reserve power to modify them after taxation (*Scott*, 1834, 13 S. 89). The expense of incidental procedure is usually reserved until the final interlocutor in the case (*California Redwood Co.*, 1886, 13 R. 1202): a general finding for expenses covers the expenses so reserved (*Gardiners*, 1885, 13 R. 80).

#### TENDER, EFFECT UPON EXPENSES.

The rule that expenses follow success is subject to modification in the event of a tender being made. A tender is a judicial offer made by the defender to the pursuer after litiscontestation. It should contain a distinct offer of a specific sum in full of all claims, along with the pursuer's expenses up to the date of the tender, with the proviso that if the pursuer rejects the offer, he is not to be entitled to read it to the jury. The tender must include expenses, to be effectual. It ought to be made by minute lodged in process; where it is an acknowledgment of a debt due, it should be put on record, but not in ordinary circumstances. It must be free from conditions and qualifications (*Low*, 1895, 3 S. L. T. 267; *Thomson*, 1896, 4 S. L. T. 261); "without prejudice" is not a condition. If a tender has been made by the defender and refused by the pursuer, and if it exceed or equal the sum awarded by the judge or jury, together with the expenses up to the date of its offer, the defender will not be held liable for the expenses subsequent to the tender being made, and the pursuer will be liable to him for such expenses (*Mitchells*, 1890, 17 R. 795). A reasonable time must be given to the pursuer to consider whether he will accept or reject a tender (*Edin. & Glas. Rwy. Co.*, 1863, 2 M. 142), but silence after a reasonable interval will be taken as refusal (*Macrae*, 1885, 23 S. L. R. 185). In actions of damages for defamation, a tender must be



accompanied by a full retraction and apology (*Faulks*, 1854, 17 D. 247). An extrajudicial offer is different from a tender: it is an offer of settlement, and is important as showing that the party has made a reasonable offer, so as to avoid expense. If made prior to litigation, it will form a fair subject of consideration in awarding expenses; and if it exceed the sum ultimately awarded, the Court will find neither party entitled to expenses (*Monteith Smith on Expenses*, p. 79; *Critchley*, 1884, 11 R. 475; *Gunn*, 1886, 13 R. 573; *Hamilton*, 1894, 1 S. L. T. 433; *Nash*, 1894, 2 S. L. T. 314). If made subsequent to litiscontestation, and not in the form of a regular tender, the general circumstances of the parties will be taken into consideration, as though it had been an offer made prior to the commencement of the litigation (*Little*, 1881, 9 R. 118). Where an extrajudicial offer was repeated on record, and subsequently accepted, the offer, though unaccompanied by a tender of expenses, was held sufficient to entitle the defender to his expenses (*Gunn*, 1886, 13 R. 573). Where an extrajudicial offer is not repeated on record, but exceeds the sum ultimately awarded, no expenses will be given to either party (*Miller*, 1895, 22 R. 600). Where the defender made an extrajudicial offer of £155, and a judicial tender of £50 but without expenses, and the pursuer was found entitled to £44, the Court gave the defender his expenses (*Mavor & Coulson*, 1892, 19 R. 868). Two of the judges, however, based their decision in this case on the fact that the conduct of the pursuer was unreasonable, and *Ld. Trayner* specially observed that he did not so decide it because of the tender. In counter-actions of damages owing to collisions, one of the parties put in offers to settle on the basis that both ships were to blame: subsequently the Court awarded the said party £300: it was held that these offers constituted a tender (*Hans Tobiasen*, 1893, 1 S. L. T. 275).

#### EXPENSES IN COURSE OF ACTION.

1. *Conclusion for Expenses*.—The conclusion in an ordinary petitory action is that the defender ought and should be decreed to pay “the sum of £ , or such other sum as our said Lords shall modify as the expenses of the process to follow hereon, conform to the laws and daily practice of Scotland used and observed in like cases.” (For forms, see *McKechnie and Lyell's Styles of Writs in the Court of Session*.)

2. *Expenses in Outer House*.—The expense of unopposed motions is never awarded at the time the motion is made. The expense of opposed motions the Lord Ordinary may modify (31 & 32 Vict. c. 100, s. 31). Expenses in the Procedure Roll when proof is allowed are usually reserved. When a case is called and no counsel appear on either side, and no reasonable excuse is given, the action is dismissed and no expenses given to either party. (*Stewart*, 1881, 19 S. L. R. 343). If the action is dismissed on a preliminary plea, the Lord Ordinary determines the question of expenses. If the pleas are repelled, no award will, as a rule, be given unless the defender gives notice of intention to reclaim. If a party is unsuccessful on a preliminary plea, but is ultimately successful on the merits, the award of expenses will only cover the expense of the discussion on the preliminary plea, if these expenses were at the time reserved (*Graham*, 1850, 12 D. 978; *Tennant*, 1874, 11 S. L. R. 418). The expense of unnecessary proof is disallowed against the successful party (*Milne Home*, 1882, 9 R. 924; *Ralston*, 1878, 5 R. 671). The expense of additional proof ordered by the Inner House will not, as a rule, be allowed (*Cairns*, 1879, 6 R. 1004).

3. *In Reclaiming Notes and Appeals*.—It is enacted that the Inner House shall in deciding a cause, also determine the matter of expenses, (6 Geo. IV. c.



120, s. 21). If an interlocutor becomes final by mistake or inadvertency, it may be submitted to the Inner House, but only on payment of all expenses by the party reclaiming: this rule is absolute (48 Geo. III. c. 151, s. 16; *Officers of State v. Alexander*, 1864, 2 M. 1294). Reclaiming on a question of expenses alone is not incompetent. The Court, however, discourages such reclaiming notes (*Fleming*, 1881, 9 R. 11). It is incompetent to reclaim against an interlocutor simply approving of the Auditor's report (*Stirling Maxwell's Trs.*, 1883, 11 R. 1), or against an interlocutor of a Sheriff which merely gives decree for expenses already found due (*Cruikshank*, 1870, 8 M. 512). Where the Court assailed a respondent in an appeal from the Sheriff Court and found the appellant liable "in the expenses of this Court," it was held to be incompetent for the Sheriff subsequently to give decree for the expenses in the Sheriff Court, on the ground that the interlocutor of the Court exhausted the cause (*Macgillivray*, 1891, 19 R. 103). Where a final interlocutor in the Inner House contains no finding for expenses, Inner House expenses are disallowed (*McDonald*, 1880, 7 R. 574): this rule, however, does not apply to interlocutory judgments (*Crabbe & Robertson*, 1896, 3 S. L. T. 368). An interlocutor which contains a finding for expenses, but reserves the question of modification, has been held not to be an interlocutor disposing of the whole subject-matter of the cause in the sense of sec. 53 of the Court of Session Act, 1868 (*Crellin*, 1893, 21 R. 21; *Taylor's Trs.*, 1896, 4 S. L. T. 15).

4. *Expense of Amendments*.—See AMENDMENT, vol. i. p. 218-219.

5. *Expense of Reponing*.—If, before the lapse of ten days from the date of a decree in absence, the defender applies for the recall of the decree by enrolling the cause, and if, when the cause is moved, the defender produces his defences and pays to the pursuer the sum of £2, 2s., the Lord Ordinary shall pronounce an interlocutor recalling the decree and allowing the defences to be received (31 & 32 Viet. c. 100, s. 23). If decree has been extracted, and nothing has been done after expiry of the charge upon it, the party must proceed as though the decree was *in foro*; if the sixty days have not expired, the procedure is by suspension or reduction. In the event of an interlocutor of a Lord Ordinary expiring through mistake or inadvertency, it is competent, with the leave of the Lord Ordinary, to submit the interlocutor to the review of the Inner House, but the party doing so will be subjected in the payment of all expenses previously incurred (48 Geo. III. c. 151, s. 16). A decree by default is a decree *in foro*, and can only be taken out of the way by reclaiming note or reduction (*Boak*, 1860, 22 D. 1468). A party will only be reponed on conditions (*Anderson*, 1875, 3 R. 254; *Orr*, 1884, 12 R. 345). Reponing is always in the discretion of the Court (*Arthur*, 1866, 4 M. 841). A party may be reponed against a protestation for not calling, by lodging his summons or other writ along with a receipt of the agent for the defender for the sum of £3, 3s., or by consigning the same sum (13 & 14 Viet. c. 36, s. 23). Where decree in absence went out against one of several defenders, one of them was reponed on payment of a proportion of the expenses incurred (*Paterson*, 1828, 6 S. 478).

6. *Expenses of Abandonment*.—The penalty of abandonment is the full expenses of the opposite party (*Hare*, 1882, 9 R. 910). If, however, the pursuer abandons upon the defender adding a new plea, he, the pursuer, will be allowed all the expenses incurred from the date when the defence ought to have been stated (*Thomson*, 1861, 23 D. 679). The expenses of a pursuer abandoning are taxed as between party and party (*Lockhart*, 1845, 7 D. 1045). A party cannot abandon his action in part (*Lord Morton's Trs.*,

1866, 4 M. (H. L.) 53. See, however, Dove Wilson's *Sheriff Court Practice*, 4th ed., 255). He may, however, put in a minute of restriction, in which case the Court is not called upon, at that stage, to deal with the question of expenses. Payment of expenses is a condition precedent to abandonment (31 & 32 Vict. c. 100, s. 39). Where the pursuer does not consent to absolvitor, a minute of abandonment by the defender, in which there is no tender for expenses, and which does not bear to be under the Judicature Act, is incompetent (*Mackay*, 1895, 33 S. L. R. 202). If not paid within a reasonable time, the defender is entitled to absolvitor (see however, *Ross*, 1889, 16 R. 871). If parties abandon by mutual consent, and nothing is said in the agreement as to expenses, neither party can go to the Court and demand decree for them (*Dobie*, 1856, 18 D. 1043). An appellant may, at any time prior to the case being ready for hearing, lodge a note asking the Court to dismiss the appeal; if this be done timeously, a modified sum of £2, 2s. will be awarded against him (*Hodge v. Downie*, May 1891, unreported; see also *Gentles*, 1880, 8 R. 13): similarly in the case of a reclaiming note being abandoned (*Davidson*, 1878, 5 R. 763). Where a wife abandoned an action for separation against her husband prior to proof, and did not ask for expenses, her agent was not allowed expenses in his own name, presumably on the ground that there had been no inquiry into the facts, to show whether the action was justifiably raised or not (*Elliot*, 1893, 1 S. L. T. 266). The rules as to abandonment apply in actions of declarator of marriage (*A. v. B.*, 1894, 2 S. L. T. 23).

7. *When payment of Expenses a Condition precedent to further Procedure.*—The law of Scotland does not proceed much on any view of equitable interference with the rights of parties to institute actions, by attaching thereto the condition of paying expenses previously incurred in another process (*Mays. of Dundee*, 1856, 19 D. 168). There are, however, exceptions. It is usually a condition precedent to a reduction of a decree in absence, that the pursuer should pay the expenses of the original action (*Mackay's Practice*, vol. ii. 498). So, too, abandonment is only permitted on payment of expenses (31 & 32 Vict. c. 100, s. 39). The making payment of expenses a condition precedent is in the discretion of the Court (*Logan*, 1896, 4 S. L. T. 23, and cases cited therein).

8. *Decree for Expenses.*—See DECREE.

#### EXPENSES IN JURY TRIALS.

1. *Generally.*—In ordinary actions the Court has absolute discretion in the matter of expenses. Where an issue was disallowed, and in consequence a supplementary summons was brought, the defenders, at the adjustment of issues in the supplementary action, moved that payment of all expenses in the first action should be a condition precedent of the supplementary action being allowed: the two actions were not conjoined, and the question of expenses was reserved (*Phillips*, 1894, 1 S. L. T. 511). In jury trials, speaking generally, the pursuer, if successful to the extent of £5 or more, is entitled to his expenses (*Adlington*, 1874, 1 R. 911). This rule, however, does not hold good where the action is for damages for loss of or injury to property where it is possible for the pursuer to estimate approximately the sum due (*Lumsden*, 1870, 8 M. 791). Mere discrepancy between the sums demanded and awarded in no way affects the rule (*Marx*, 1884, 21 S. L. R. 407). If the pursuer recovers less than £5, he will not be awarded his expenses unless the judge certifies that the action was brought to try a right besides the mere question of damages; or that the injury done was malicious; or that the action was brought for vindication

of character, and was fit to be tried in the Court of Session (31 & 32 Vict. c. 100, s. 40). Wherever such a certificate is awarded, it is beyond the power of the Court to interfere (*Macmillan*, 1887, 15 R. 6). The expenses of adjustment of issues are regulated by the rules applicable to procedure in an ordinary action. The remuneration of the jurors is paid by the unsuccessful party, except in the case of a special verdict, when the amount falls to be paid in equal portions by both parties. The agent is personally liable for the expense of the jurors. In the event of postponement of a trial, the party obtaining the postponement must pay to the other party any expenses caused thereby (A. S. 16 February 1841, s. 25). When decree is given for "expenses of trial" only, it comprehends all expenses subsequent to the adjustment of issues (*Pearson*, 1866, 5 M. 44). The pursuer may abandon a jury trial on the same terms as an ordinary action. When a party appeals for jury trial from the Sheriff Court, the Court may remit the case back to the Sheriff, on the ground that it is better fitted for his consideration, and may direct him to deal with the expenses of the appeal (*Cunningham*, 1894, 2 S. L. T. 50).

2. *Expense of New Trial*.—Formerly it was a condition precedent to obtaining a new trial, that the unsuccessful party should pay the expenses of the first trial (*Dargie*, 1857, 19 D. 878). Now, however, it is the almost invariable rule to reserve the expense of the first trial until the result of the second is known (*Fraser*, 1882, 10 R. 264). In a recent case, where the first trial had been rendered nugatory by the action of the defenders, the pursuer was found entitled to the expenses of the first trial, in so far as not available for the second (*Gibson*, 1895, 22 R. 491). When a party is successful in the second trial, but unsuccessful in the first, it is the practice to award the expenses of the first trial to neither party (*Stewart*, 1870, 8 M. 486: but see *Pagan*, 1871, 8 S. L. R. 645). Where there were charges of fraud, facility, and circumvention made at the first trial, and these charges were ultimately withdrawn prior to the second trial, the expenses of the first trial were given to the unsuccessful party (*Cockburn*, 1895, 22 R. 376). Where the same party is successful in both trials, it is usual to allow him the expenses of both (*Macintosh*, 1871, 10 M. 29).

#### EXPENSES IN MISCELLANEOUS ACTIONS.

1. *Actions of Constitution*.—The conclusion for expenses should be so worded as to ask for them only in the event of the claim being opposed, for it is a rule that a creditor is bound to constitute his debt against the debtor's representatives at his own expense (*Ferguson*, 1749, M. 4040). Where decree is asked against an executor *cognitionis causa tantum*, no expense will be awarded if no defence is put in (*Davidson*, 1867, 6 M. 151).

2. *Actions of Reduction*.—In such actions there is little or nothing peculiar in the matter of expenses. The successful party is entitled to expenses, unless there be a number of special reasons showing it to have been very doubtful in the course of the proceedings which party was right and which was wrong. The interest which the unsuccessful party may have had in defending is nothing (*Gifford*, 1837, 15 S. 1255, per Ld. Glenlee; *Grieve*, 1869, 8 M. 317). In a reduction of a decree for aliment, it was pled, as a preliminary plea, that the expenses of obtaining the decree should be paid before an order to satisfy production: the defence was repelled on consignation of a sum sufficient to cover said expenses (*Bradley*, 1895, 2 S. L. T. 370).

3. *Proving of the Tenor*.—Expenses are, as a rule, given against the defender only where extra expense has been caused by his unreasonable



opposition (*Richmond*, 1869, 7 M. 956). If the *casus amissionis* be the act of the defender, he may be held liable (*Broune*, 1872, 10 M. 397).

4. *Special Cases*.—In special cases concerning the construction of trust deeds all parties get their expenses, if the questions raised are the ambiguity or obscurity of the deed. By 31 & 32 Vict. c. 100, s. 63, it is provided that the Court shall dispose of all questions of expenses in special cases. [For general rule as to, see *Baroness Gray*, 1870, 7 S. L. R. 633.]

5. *Multiplepointings*.—The expenses of the real raiser form a preferable charge on the fund *in medio*, unless the action is dismissed as incompetent (*Hepburn's Tr.*, 1894, 21 R. 1024). It is considered that the expenses of the real raiser will never be allowed as against an unsuccessful claimant (*Shaw*, 1894, 2 S. L. T. 110). The nominal raiser is also entitled to any expense he may be put to. Raisers are personally liable for the expenses of claimants when the Court considers that the process has been raised unnecessarily (*Home's Trs.*, 1834, 12 S. 727). Each claimant bears his own expenses, unless his claim have been opposed (*Buchanan*, 1830, 8 S. 516). So long as the fund is *in manibus curiæ*, any person is entitled to put in a claim. If a claimant be not called as defender, he may lodge his claim at any time without payment of expenses (*Johnston*, 1832, 10 S. 195); but if he has been called as defender and has failed to lodge his claim within the allotted time, he will usually be called on to pay all expenses previously incurred (*Dymond*, 1877, 5 R. 196). If an interlocutor has been issued ranking and preferring claimants, parties who, though called, fail to lodge claims, are allowed to reclaim, for the purpose of lodging claims, on condition of their paying all prior expenses, which would not be available at future stages of the case (*Binnie's Trs.*, 1883, 10 R. 1075). In a case where objections were not timeously lodged, the Lord Ordinary admitted them on payment of £2, 2s. (*Macnab*, 1893, 1 S. L. T. 262). When questions of construction of trust deeds and succession are tried by multiplepointing, then, if the subject of the action be the ambiguity or uncertainty of the deed, expenses of all parties will be allowed out of the estate. The expense of trying questions of validity has also been allowed (*Costine's Trs.*, 1878, 5 R. 782). There is no general rule as to the expenses of all parties being allowed out of the trust funds (*Moram*, 1867, 5 M. 353). Where the Court is of opinion that the bringing an action of multiplepointing was incompetent and unnecessary, the parties bringing it may be held personally liable in expenses (*Mackenzie's Trs.*, 1895, 2 S. L. T. 416).

6. *Consistorial Actions*.—A. *Divorce and Separation*.—If a woman has no separate estate of her own, she is entitled to interim decree against her husband for a sum sufficient to enable her to defend an action of divorce (*Dixon*, 1841, 3 D. 559). No interim award will be given until defences have been lodged (*Anderson*, 4 S. L. T. 50). In actions of separation, interim award is sometimes refused (*Stewart*, 1863, 1 M. 449). Her agent should from time to time, during the progress of the case, apply for interim awards. Lord Fraser was of opinion that this practice was affected by the Married Women's Property Act. In the case of *Milne* (1885, 13 R. 304), he stated that the foundation on which this practice rested had been cut away: "the practice rested on this principle, that the wife had no personal estate. It was all swept away by the husband's *jus mariti*." This view, however, appears to go too far. It may be taken for granted that a wife without personal estate will be entitled to decree for interim sums, and to her whole expenses at the end of the action, whether successful or not (opinion of Ld. Pres. Inglis in *Milne*, *supra*; *Penman*, 1894, 2 S. L. T. 268). Where, however, the judge was of opinion that the defender's defence was



utterly frivolous, no expenses were awarded (*Nisbet*, 1895, 2 S. L. T. 96: see also *Kirkhope*, 1896, 4 S. L. T. 273). A full statement of the wife's funds must be submitted to the Court (*Pitt*, 1862, 24 D. 1444). When the wife is pursuer, the position is somewhat different. A good *prima facie* case is, as a rule, necessary before a woman, when pursuer, obtains an award of expenses: formerly *semiplena probatio* was necessary (*D'Ernesti*, 1882, 9 R. 655). This interim award is given to meet current expenses, and not to pay the agent's business account (*Mitchell*, 1893, 1 S. L. T. 179). When the wife has separate estate, the wife is not entitled to expenses, in the event of her being unsuccessful, whether she is pursuer or defender; nor has the husband to pay interim awards (*Macfarlane*, 1844, 6 D. 1220; *Henderson*, 1888, 16 R. 84). It is for the Court to determine what is separate estate: the earning of wages is not separate estate (*Milne*, 1885, 13 R. 304). A wife with separate estate is liable in costs, like any other litigant (*Froebel*, 1884, 22 S. L. R. 22: but see *Macenzie*, 1895, 32 S. L. R. 455). It has never been laid down that, in counter-actions of divorce, where the husband is successful in both and the wife is found liable in expenses in the action raised at her instance, these expenses are to be set off against the expenses which have been awarded to her in the other action (but see *Craig*, 1852, 14 D. 829). If the wife is successful in the Outer House, she is entitled to expenses to defend the judgment (*Symington*, 1874, 1 R. 1006). If the husband is successful and the wife appeals, she has not the same right, unless the Court is of opinion that her appeal was justifiable (*Hoy*, 1884, 11 R. 905; *Hunt*, 1893, 31 S. L. R. 244; *Rose*, 1894, 2 S. L. T. 33; *Montgomery*, 1881, 8 R. 403; *Kirk*, 1875, 3 R. 128). In reductions of decrees of divorce, the wife, if unsuccessful, is refused her expenses (*Begg*, 1889, 16 R. 550). By the Conjugal Rights Act, 1861, 24 & 25 Vict. c. 86, s. 7, a co-defender may be found liable in the whole expenses of process (*Munro*, 1877, 4 R. 332). If the co-defender was not aware that the woman was married, he will not probably be held liable (*Kydd*, 1864, 2 M. 1074). On the other hand, the co-defender will get his expenses if he is assoltized, unless in exceptional circumstances (*Edward*, 1879, 6 R. 1255; *Collins*, 1882, 10 R. 250). When expenses are awarded against a co-defender, the award only covers expenses prior to decree, and those necessarily consequent thereon (*Hamilton*, 1896, 4 S. L. T. 274).

**B. Declarator of Marriage.**—Except in exceptional circumstances, the female litigant is not entitled either to interim expenses or to the expenses of process, unless successful (*Browne*, 1843, 5 D. 1288). If there is a strong *prima facie* presumption in her favour, she may be awarded an interim sum (*Browne, supra*). On the other hand, if successful before the Lord Ordinary, she will be allowed an interim amount to defend the judgment (*Forster*, 1869, 7 M. 546).

**C. Declarator of Nullity.**—If the woman sues for nullity, she admits the invalidity of the marriage, and can have no allowance; if she is defendant and alleges the validity of the marriage, she may have an award *pendente lite* (*Stewart on Marriage and Divorce*, p. 369). It is probable that, so long as a woman retains the *prima facie* character of wife, she will be entitled to interim expenses (*MacKay's Practice*, vol. ii. p. 561). After final decree of nullity, expenses will not be given to the unsuccessful wife.

**D. Actions of Aliment.**—The wife may in such actions obtain an interim award (*Crombie*, 1868, 6 M. 776).

**E. Custody of Children.**—In petitions for custody, there is no general rule as to expenses. In two comparatively recent cases, expenses have been refused to the wife (*Beattie*, 1883, 11 R. 85; *Lang*, 1869, 7 M. 445);

while in two others expenses were allowed (*Lilley*, 1877, 4 R. 397; *Bloc*, 1882, 9 R. 894).

7. *Diligence*.—In *adjudications*, it is improper to insert any conclusion for expenses in the summons, and no expenses will be awarded unless there is unreasonable opposition (*Shand's Practice*, ii. 675). In adjudications in implement, there is usually a conclusion for expenses in the event of the defender appearing and occasioning expense (*Juridical Styles*, "Signet Letters"). In *furthcomings*, expenses are concluded for only against the common debtor (*Mackay's Practice*, ii. 554). If the debt is not disputed, the expenses are not recoverable (*May*, 1825, 4 S. 76, per *Ld. Glenlee*). In *poinding and sale* and *poinding of the ground*, it is not competent to poind sufficient property to cover the expenses of the diligence: they must be recovered by a separate action. In *sequestrations for rent*, if the landlord uses this remedy for the purpose of creating a security, he must do so at his own cost (*Gordon*, 1836, 14 S. 954). The expense of using *arrestments and inhibitions* on the dependence of an action is never awarded as part of the expenses of process (*Bluck*, 1887, 14 R. 678; *Symington*, 1874, 1 R. 1006). There seems to be no general rule as to the expense of recall of diligence under 1 & 2 Vict. c. 114, s. 20. Except in cases where the use of diligence is nimious, oppressive, or in any sense improper, the cost of recall falls on the party requiring the discharge, but beyond this there is no general rule (*Laing*, 1868, 6 M. 282). The Court has recently held that a party who had used diligence was not bound to loose it extrajudicially, and was not liable in the expense of having it recalled (*Roy*, 1891, 18 R. 717; *Robertson*, 1896, 4 S. L. T. 174).

#### EXPENSES AS AFFECTING DIFFERENT PARTIES.

1. *The Crown*.—By 19 & 20 Vict. c. 56, s. 24, it is provided that in all cases at the instance or on behalf of the Crown against any person or persons, or against the Crown at the instance of any person, the successful party shall be entitled to an award of expenses. This applies to civil cases only, not to criminal cases. Justices of the Peace cannot award expenses in such cases (*Wilson*, 1878, 5 R. 1097; *Gilroys*, 1866, 4 M. 656: but see *Alison*, 1862, 1 M. 87). When the Crown merely concurs in an action, stipulating for no responsibility as to expenses, the Court will refuse to find the Crown liable (*Stephen*, 1878, 6 R. 282).

2. *Dominus litis*.—A *dominus litis* has been defined as "a party who has an interest in the subject-matter of the suit; and through that interest, a proper control over the proceedings in the action" (*Mathieson*, 1853, 16 D. 19). His interest in it must be direct, and he must expect to obtain some ultimate benefit from its issue (*Potter*, 1870, 8 M. 1064). To establish the character of *dominus litis*, it must be shown that the party was in reality the principal, disclosed or undisclosed, in the action, and that the actual litigant was merely his agent (*Fraser*, 1895, 33 S. L. R. 594; *Docherty*, 1895, 2 S. L. T. 408; *Armstrong*, 1895, 2 S. L. T. 525). When a party not mentioned in the action is the true *dominus litis*, the Court will either require the nominal litigant to find caution (*Jenkins*, 1869, 7 M. 739), or hold the *dominus litis* liable in expenses in the event of failure (*Thomson*, 1878, 5 R. 561; *Heppburn*, 1874, 1 R. 875). The fact that a law agent has taken an assignation of his client's claim and action, in security of debt, does not constitute the agent *dominus litis* (*Fraser*, 1839, 1 D. 882; *Walker*, 1843, 2 Bell's App. 57).

3. *Husband and Wife*.—A husband is liable in our law for all expense incurred by his wife which may be necessary "for her personal safety, the

maintenance of her honour, or the preservation of her status in society" (Fraser on *H. & W.* 614: for what is included under necessary expenses, see *Wilson*, 1868, 3 L. R. Ex. 63). The expense of a consistorial action is a necessary expense (*Brown*, 25 L. J. Q. B. 193). When a wife has separate estate, speaking generally, procedure for its recovery is a debt of her own (*Brown*, 1830, 8 S. 834: for expenses of a consistorial action when the wife has separate estate, see p. 163 of this volume). If the husband concurs with his wife in an action relating to his wife's separate estate, he will be jointly liable with his wife for the expenses (*Fraser*, 1892, 19 R. 564; *Scott*, 1851, 13 D. 503). The concurrence must, however, be clear and explicit (*Whitehead*, 1893, 20 R. 1045). If he refuses so to concur, he may or may not be liable, according as the Court is of opinion that his refusal was or was not justifiable (Fraser on *H. & W.*, 2nd ed., p. 584). A husband is not liable for his wife's delicts or quasi-delicts, or for expenses in connection therewith (*Scorgie*, 1872, 9 S. L. R. 292).

4. *Joint Litigants and Several Defenders.*—Joint litigants, maintaining the same pleas, are only entitled to one set of expenses (*Bell*, 1883, 10 R. 905; *Burrell*, 1877, 4 R. 1133; *Dubs*, 1876, 3 R. 758; *Stott*, 1878, 16 S. L. R. 5. But see *Welsh*, 1894, 31 S. L. R. 687). One of several litigants, who is alone successful in the Outer House, is entitled to a watching fee in the Inner House (*Palmer*, 1871, 10 M. 185). When two litigants conduct a case jointly, and one gets decree with expenses, these expenses are limited to the amount he will have to pay to his agent: it includes all his separate expenses, and one-half the joint expenses (*Robertson*, 1875, 2 R. 970). Where three defenders employed the same agent, and one only was successful, he was found entitled to only one-third of the agent's expenses, in so far as incurred on behalf of the three defenders in common (*Arthur*, 1895, 22 R. 904). A joint litigant will be responsible for expenses even though his taking part in the action caused no additional expense (*Watson's Trs.*, 1887, 14 R. 718); and a litigant against whom expenses have been awarded, while his co-litigants have been successful, is liable in such expenses as he would have had to pay had he been sole litigant (*McLeod*, 1870, 8 M. 528). A party successful against joint litigants is entitled to expenses against them all, jointly and severally, reserving relief to each *inter se* (*McGlashan's Sh. Ct. Practice*, p. 325); joint defenders will only be liable *singuli in solidum* if the decree is against them all conjunctly and severally: several pursuers will be thus liable, whether decree be in this form or not (*Logan*, 1852, 15 D. 94). Simple concurrence involves liability for expenses (*Alexander*, 1856, 18 D. 617). Where one of several litigants abandons, he will be conjunctly and severally liable for all the expenses up to the date of decree against him, with a right of relief (*Mackenzie*, 1852, 15 D. 61). Where expenses are apportioned amongst several litigants, the liability of each for expenses is proportionate to the amount decreed for against them in the action (*Blain*, 1836, 14 S. 361). So where creditors on a bankrupt estate were assailed with expenses from an action against them by the trustee, but failed to obtain their expenses owing to want of funds, they divided the expense *pro ratu* (*Cruickshank*, 1843, 5 D. 1158). Anyone sisting himself as a party to an action is liable for all expenses prior to his appearance (*Torbet*, 1849, 11 D. 694; *Wallace*, 1836, 14 S. 599; but see *Muir*, 1843, 5 D. 579). If a pursuer, at the instance of the defender, calls new parties as defenders, and is unsuccessful against them, the original defender will be liable for the expenses of the new-comers (*Brountie*, 1855, 17 D. 422). When one of several defenders opposes on a preliminary plea, the whole expense falls on his shoulders alone (*Whitehead*, 1862, 24 D. 313).



When one of two defenders is assolzied, the unsuccessful defender is held to have been the cause of the expense of the successful defender, and is liable in all expenses incurred (*Beattie*, 1863, 1 M. 434; *Simpson*, 1883, 10 R. 928; *Straiton Estate Co.*, 1880, 8 R. 299; *Rooney*, 1895, 33 S. L. R. 7; *Cowan*, 1877, 5 R. 241). This rule is not, however, absolute (*Palmer*, 1871, 9 S. L. R. 134). Whenever, in the case of several defenders, the Court finds them entitled to expenses generally, it is intended that the question is reserved for consideration subsequent to taxation (*Cameron*, 1893, 1 S. L. T. 259). Where decree for expenses goes out against several defenders jointly and severally, and one of them offers to pay the whole sum on obtaining from the pursuer an assignation of the decree, he is entitled to obtain the assignation (*Mackay*, 1896, 4 S. L. T. 294).

5. *Trustees*.—A. *Generally*.—There is a general rule of Scots law, that every sum or subject is primarily and inherently burdened with the necessary expense of taking care of itself (*Anderson*, 1839, 1 D. 889). Everyone, however, is not entitled to attack a trust deed in the expectation that the expenses of doing so will come out of the trust funds. In questions of ambiguity (*Whyte*, 1881, 8 R. 940), or of imperfection of the deed (*Graham*, 1850, 13 D. 420), or where the decision clears a point in the administration of the trust,—the Court will, as a rule, give expenses to all parties out of the trust funds (*Lloyd's Curator*, 1877, 5 R. 289); so, too, when all the parties sign a joint minute consenting to the expenses being paid out of the fund (*Walker's Trs.*, 1870, 7 S. L. R. 541). Where doing so, however, means that the successful party pays the expenses of the unsuccessful, the Court will refuse to follow this rule (*Kennedy*, 1841, 3 D. 1266): wherever, in fact, following the rule will impose a hardship, the Court will refuse to follow it. Where a trustee is removed for misconduct, he may be held personally responsible for the expense of the petition to remove him (*Jackson*, 1865, 4 M. 177), and he certainly will be refused the expense of resisting the petition (*Thomson*, 1865, 3 M. 336). All the judicial expenses incurred by a trustee in managing a trust estate fall to be paid out of the capital of the estate (*Baxter and Mitchell*, 1864, 2 M. 915). The expenses of an action of distribution and exoneration form a good charge on the estate.

B. *Personal Liability to Third Parties*.—On this matter Ld. McLaren observes: "Subject to certain exceptions . . . a trustee is generally liable to creditors for any expense which may be occasioned by opposition on his part to their just demands" (McLaren on *Wills*, vol. ii.). If trustees have an action raised against them in their trust capacity, and defend it reasonably, decree, it is thought, will only be given against them *qua* trustees (*Young*, 1876, 3 R. 991; *Kirkland*, 1842, 4 D. 613; but see the recent case of *Craig*, 1896, 34 S. L. R. 22). If decree go against them *qua* trustees, they will not be personally liable, even if they have not sufficient trust funds to meet the expenses (*Craig*, *supra*; *Davidson's Tr.*, 12 D. 1069). If, however, the trustees, in the opinion of the Court, act unreasonably in defending an action, and generally if they are pursuers, decree will, in the event of their being unsuccessful, be given against them personally (*Scott*, 1826, 5 S. 172; *Wylie*, 1834, 13 S. 40; *Clyne's Trs.*, 1840, 2 D. 554; but see *Craig*, *supra*). The reasons of a trustee's liability are thus stated by Ld. Cringletie in *Gibson v. Pearson* (1833, 11 S. 656): "If he have not funds of the estate, he ought not to litigate; or if he do, he must recover his relief from his constituents . . . The trustee is the representative of the creditors: he is their mandatory; he has their authority to carry on the suit: and if he has not funds in his hands, it is his duty to call on them



to contribute to relieve him." In this case the party was a trustee in bankruptcy, but the above opinion is applicable to ordinary trustees as well. A trustee is in the same position as an ordinary person: execution pending appeal may be granted against him personally (*Robertson*, 1823, 2 S. 553), he may be compelled to find caution (*Richmond*, 1850, 12 D. 1017), he may be decreed against as *dominus litis* (*Fleming*, 1829, 8 S. 172). What he ought to do, if he has no trust funds, is to obtain from the beneficiaries a written agreement, shifting the real responsibility on to their shoulders. In actions of reduction of trust settlements, trustees stand in a peculiar position: they are entitled to defend an action of this description without personal liability, so long as they have been acting in good faith (*Graham*, 1860, 23 D. 41: see also *Watson*, 1875, 2 R. 344, per Ld. Pres. Inglis).

C. *Liability to Beneficiaries*.—In questions with persons claiming under a settlement, a trustee is entitled to his expenses out of the fund (*Dunbar*, 1850, 13 D. 54): so also he is entitled to the expense caused by an action for his exoneration, so long as such an action is not rendered necessary by the fault or negligence of the trustee himself (*Presbytery of Dundee*, 1863, 1 M. 473; *Hill*, 18 D. 316; *Kerr's Trs.*, 1850, 12 D. 1041). The test of liability in actions against beneficiaries is *bona fides* (*Dickson*, 1829, 8 S. 99; *Clyme's Trs.*, 1848, 10 D. 1325). Unless they act unreasonably or recklessly, they are entitled to their expenses out of the estate, upon the principle that representative persons are entitled to the costs necessarily incurred in the interests of their constituents (*Gibson*, 1895, 22 R. 889). A legatee is entitled to his legacy free of the expense of realisation, and so is not liable for any expenses occasioned by proceedings initiated for the forthcoming of his legacy (*M'Eachern*, 1865, 3 M. 833; *Murray*, 1831, 9 S. 631). The expense of litigation between trustees does not fall on the trust estate (*Fotheringham*, 1852, 14 D. 427).

6. *Tutors and Curators*.—The position of a tutor in the matter of liability is different from that of a trustee: a trustee may generally obtain the sanction of his beneficiaries, a tutor must act on his own responsibility. The Court accordingly deal more leniently with a tutor (*Thomson*, 1840, 2 D. 1234). He will only be held personally liable if the proceedings are unnecessary or improper, or if the action is calumnious (*Johnstone*, 1856, 18 D. 343). So, too, with a curator *bonis*: he will be personally liable for any breach of duty (*Forbes*, 1845, 7 D. 853). Where a curator applies to the Court for powers, the expense of his application will be paid out of the funds (*Aikman*, 1863, 1 M. 1140). A curator *bonis* is not entitled to charge for professional business done in connection with the estate, in addition to his commission, except for sums actually out of pocket (*Kennedy*, 1860, 22 D. 567). As to a curator *ad litem*, there can be no decree for expenses against him (*Fraser*, 1847, 9 D. 903; *White*, 1894, 21 R. 649). Curators *ad litem* are entitled to professional remuneration (*Pirrie*, 1851, 13 D. 841). A father litigating as tutor to his son is to be regarded as a voluntary trustee, and as therefore personally liable for expenses in the event of want of success (*White*, 1894, 21 R. 649). Where a daughter, with the consent and concurrence of her father, brought an action for damages and was unsuccessful, the Court found the father liable in expenses (*Fraser*, 1892, 19 R. 564).

7. *Judicial Factor*.—In a petition for the appointment of a judicial factor, the ordinary rules as to expenses apply (*Thomson*, 1865, 3 M. 336). When there is a competition for the office, the Court may or may not allow the expenses of all parties out of the fund. The rule seems to be that the unsuccessful competitor will not get his expenses out of the estate unless

his procedure shall have been necessary and useful to the estate (*Brown*, 1852, 14 D. 856). As to the expense of recall of appointment, it will not be allowed out of the estate if the factor has misconducted himself or failed in the discharge of his duty: the factor will be held personally liable (12 & 13 Viet. c. 51, s. 6: Thoms on *Judicial Factors*, 2nd ed., p. 512). As to the personal liability of a judicial factor, the whole question was under the consideration of seven judges in the recent case of *Craig v. Hogg*, 1896, 34 S. L. R. 22: in this case it was held that a judicial is not personally liable where the decree finds him liable "as judicial factor." It is a matter of regret that the larger question was not decided, viz. whether a judicial factor who is unsuccessful is, as a rule, to be made personally liable: four of the judges were of opinion that he was, and three that he was not, but the question was not actually decided. All the authorities on the subjects were referred to in the case of *Craig*, and will be found in the report of that case.

8. *Public Officials*.—A body of public trustees are, it is considered, in the same position as ordinary trustees in regard to personal liability (see *Young*, 1876, 3 R. 991, and 7 R. 891). The expense of promoting or opposing Bills in Parliament will only fall on the trustees themselves in the event of the promotion or opposition not being a fair and reasonable act of administration on their part (*Perth Water Commissioners*, 1879, 6 R. 1050). There is all the difference between opposition by a governing body to the propositions of third parties, and opposition to the propositions of its own constituents (*ib. per* Ld. Moncreiff). Where it is necessary for a burgh, through its officials or other authority, to petition the Court to appoint a returning officer to conduct an election, the expense falls on the corporation funds (*Muirhead*, 1886, 14 R. 18). As to charity trustees, they will be allowed out of the charity funds the costs of all proceedings conscientiously and properly directed to the just ends of administering the charity (*Clephane*, 1864, 2 M. (H. L.) 7).

9. *Agents*.—A. *Liability of*.—There are certain items in which a law agent is always liable in the first instance: such are, the fees of Court, the fees of a Commissioner (*McLachlan*, 1851, 13 D. 1345: Mackay's *Practice*, vol. ii. 570), fees to counsel's clerks, though not fees to counsel (*Fortune's Executors*, 1864, 2 M. 1005: *Cullen*, 1862, 24 D. 1132); the expense of printing (*Neill & Co.*, 1850, 12 D. 618), of witnesses (*McDonald*, 1839, 1 D. 677) and of jurors: also the expense of an accountant employed to make up a state of accounts (*Hutcheon*, 1831, 9 S. 511). Apart from these items, an agent will only be held personally responsible for gross negligence or fault (*Begg on Law Agents*, p. 280). If an agent conducts a case without the authority of his principal, he will be personally liable to his opponent, if the principal disclaims (*Macquereu*, 1826, 4 S. 786; *Cowan*, 1836, 14 S. 634). An agent acting for an insane person is personally liable, as an insane person cannot give a mandate (*McCull*, 1862, 24 D. 393: but see *Begg on Law Agents*, p. 282). If a question rises as to an agent's authority, he must produce his mandate: if he fails to do so, he may be held personally liable (*Hepburn*, 1874, 1 R. 875).

B. *Remuneration of*.—A law agent has a right to remuneration. The fact of employment involves this right (*Wallace*, 1825, 6 S. 1018), though it may be lost by a specific agreement (*Bayne*, 1836, 15 S. 22: *Lockharts*, 1830, 9 S. 134). This remuneration is regulated by rules. An agent for several co-litigants has a claim against each for the whole expenses (*Webster*, 1852, 14 D. 932). It is the practice to allow a law agent, who has conducted his own case, to make professional charges. (As to the items

allowed, see *Cuthbertson*, 1860, 22 D. 389.) An unlicensed law agent is entitled to nothing but his outlays (*Ireland*, 1851, 13 D. 1226). Agent's fees are regulated by A. S. 15 July 1876. Remuneration may, however, be allowed beyond the usual rates, though this is rarely done (*Bolden*, 1850, 12 D. 798). It is thought that a law agent could not enforce an agreement under which he was to receive more than the usual professional remuneration (Begg on *Law Agents*, p. 121). An agent may agree to act for nothing, or only to charge outlays, taking his chance of recovering expenses in the event of success (A. S. 15 July 1876). One or other of these courses is followed when one agent is acting for another.

C. *Agent-Disburser*.—See HYPOTHEC.

D. *Agent's Lien*.—See LIEN.

E. *Agent and Client*.—See TAXATION.

F. *Law Agent's Account*.—For forms of agent's accounts, see Monteith Smith on *Expenses*, Appendix. There are no imperative regulations on the subject. The account should contain all the matter necessary to enable the Auditor to tax it, and the client to check it (*Grant*, 1870; *Cuthrie's S. C. Cases*, p. 11). The charges must be set forth in detail. At taxation, the account must be lodged with the Auditor, while a copy of it must be served on the agent of the party or parties found liable in expenses, that he may attend at the time so fixed (A. S. 11 July 1828, s. 69). Fees to witnesses must be stated in a schedule apart, and a special schedule must be appended containing the names of the witnesses not examined, and the reasons of their non-examination. As regards interest on an agent's account, there is a distinction between cash advances and business charges. "As regards cash advances, it is settled that interest is due upon these from the date of advance, provided they are of the kind of advances usually put into a cash account. Ordinary judicial expenses paid out by an agent, outlays for printing, and similar payments, are not considered cash advances coming within the rule. All other outlays, however, made by an agent, such as . . . counsel's and accountant's fees (*Barclay*, 1850, 22 Se. Jur. 354), stumps, and such like, are advances on which the agent can claim interest, just as a banker can do on advances he makes" (*Blair's Trs.*, 1884, 12 R. 104, per Ld. Fraser). When a party is found entitled to the expenses of judicial proceedings, he may not charge interest on the sum awarded until the debt has been constituted by decree (2 Bell, *Com.*, 7th ed., 691); but from the moment decree is granted interest runs (*Wallace*, 1876, 4 R. 264). In exceptional circumstances the Court may award interest on judicial expenses prior to decree (Monteith Smith on *Expenses*, p. 183, and cases cited therein in note (c)). When the House of Lords reverses, the unsuccessful respondent does not require to repay interest on the expenses, unless specially ordered to do so (*Ewart*, 1865, 3 M. 1167; *Fleeming*, 1868, 7 M. 79). The triennial prescription applies to a law agent's account (1 Bell, *Com.*, 7th ed., 348). A law agent is not entitled to payment of his account when loss arises to his client owing to his negligence or mismanagement (*Ranken*, 1855, 17 D. 363); but the misconduct of the country agent does not bar the town agent from payment (*Hamilton*, 1868, 6 S. L. R. 14). An agent can always shield himself by taking the opinion of counsel (*Batchelor*, 1876, 3 R. 914). An agent is never allowed his fees where there has been no lawful agency (*Winton*, 1868, 6 M. 1095). The agent of a wife in a consistorial action is entitled to get himself sisted, with a view to his expenses, when the parties settle behind his back (*Cornwall*, 1871, 8 S. L. R. 442). In addition, he has a right of action against the husband (*Clark*, 1875, 2 R. 428). As to the expenses of agents



in multiplepointings, see Auditor's report in *Greenhill*, 1861, 23 D. 1006; and *Sibbald's Trs.*, 1871, 9 M. 399.

#### BANKRUPTCY PROCEEDINGS.

*A. Necessary Expenses.*—All the necessary expenses incurred in bankruptcy proceedings fall to be paid out of the trust funds. It is provided by the Bankruptcy Act, 1856, that the expenses of the petitioning or concurring creditor, incurred in obtaining the sequestration or doing other necessary acts prior to the election of the trustee, must be paid out of the first of the funds that come into the hands of the trustee (19 & 20 Vict. c. 99, s. 41). By the "first of the funds" is meant the first funds not affected by adjudication or other securities of preferable creditors (*Taylor*, 1840, 2 D. 512 and 812). Except in very special circumstances, neither the trustee nor any of the creditors are responsible for these expenses personally (*Bell*, 1854, 16 D. 915; 19 & 20 Vict. c. 99, s. 57). The petitioning creditor, even though unsuccessful, may, if the Court is of opinion that he has been justified in bringing his petition, be found entitled to expenses (*Steel*, 1852, 14 D. 348). Creditors who give useful information to the Accountant are entitled to the expense incurred in connection therewith (Goudy on *Bankruptcy*, 2nd ed., 451). Necessary expenses include all the expenses of management, including all debts properly chargeable against the trustee. Only necessary expenses are paid out of the trust funds (*Accountant in Bankruptcy*, 1862, 1 M. 124). In a sequestration appeal on the ground that the statutory notice had not been given, the expense of appearance by both the trustee and the bankrupt was allowed (*Cookson*, 1864, 2 M. 662). All accounts for law business by the trustee must be submitted to the Auditor (B. A., 1856, s. 154). Where the funds in the hands of the trustee were insufficient to meet the expenses of sequestration, the bankrupt at the end of two years was refused his discharge (*McCarter*, 1893, 20 R. 1090). In a liquidation, the expenses of a petition for rectification of the register are held to be expenses of the liquidation (*Columbia S. S. Co.*, 1895, 2 S. L. T. 523). A liquidator may be found personally liable in expenses (*J. Smith & Sons*, 1894, 2 S. L. T. 236).

*B. Liability of Trustee in Bankruptcy.*—In a competition for the office of trustee, the ordinary rules as to expenses are followed (20 & 21 Vict. c. 19 s. 4). Expenses may be in part disallowed (*Dyce*, 1847, 9 D. 1161), or modified (*Menzies*, 1851, 13 D. 1044). Where a trustee considers that he ought not to sist himself as party to an action raised against the bankrupt prior to litigation, he ought to make a tender: if he does not do so, the trust estate will be liable, in the event of the bankrupt being unsuccessful, both in the amount awarded and in expenses (*Miller*, 1884, 11 R. 729). Where a trustee initiates an action, he will be personally responsible (*Cowie*, 1893, 20 R. (H. L.) 81; *Tunnock's Trs.*, 1865, 4 M. 83). So, too, if he sists himself in an action begun prior to the sequestration, he will be liable for the whole expenses of the action (*Torbet*, 1849, 11 D. 694); moreover, if he sists himself, he must do so unconditionally (*Ellis*, 1870, 8 M. 805). It would seem, however, that he is not liable for expenses incurred prior to his sisting himself, if he does not avail himself of the proceedings which caused the expense (*Paddie*, 1856, 18 D. 1306; *Paterson*, 1824, 3 S. 103). Any expense in a sequestration, caused by the fault or neglect of the trustee, falls upon the trustee personally (*A. B.*, 1856, 18 D. 1306). By the Bankruptcy Act, s. 158, if the trustee fails to make an annual return, he is liable in the expenses incurred by an objecting



creditor. If a trustee desires to transfer liability from himself to the creditors, he ought to obtain a mandate from them before taking steps in an action (*Curriek*, 1854, 16 D. 410). But before insisting against the creditors personally, he must recover all the funds of the estate (*Johnstone*, 1832, 10 S. 657). Where the intention of the Court is that a trustee shall be personally liable, in the event of insufficiency of trust funds, decree should be against him personally, and not *qua* trustee (*Davidson's Trs.*, 1850, 12 D. 1069).

C. *Liability of Bankrupt, etc.*—A party who, pending an action, becomes bankrupt, must find caution for future expenses (*Mackervsey*, 1850, 12 D. 1057; *Ramsay*, 1847, 10 D. 234). If a trustee does not sist himself, and no caution is demanded, the bankrupt's opponent, in the event of success, is entitled to rank on the estate for the whole expenses of the action (*Miller*, 1884, 11 R. 729). The liability of creditors for the expenses of sequestration is regulated by the Bankruptcy Act, 1856, s. 57. Speaking generally, the creditors are exempt from these expenses; but, by acting on their part, they may incur responsibility. The general rule is that "creditors in a sequestration are never to be asked to put their hands in their own pockets, unless they expressly undertake to do so" (*Barelay*, 1868, 7 M. 9, per Lord President Inglis). What acts will be sufficient to make them liable is not clear; the matter was discussed fully in the case of *Barelay* above referred to. Secured creditors cannot be made liable for the expenses of sequestration (*Globe Insurance Co.'s Trs.*, 1839, 1 D. 605).

D. *Miscellaneous.*—A creditor appealing against the decision of a trustee will be liable in expenses if unsuccessful (*Houston*, 1841, 4 D. 80). In sequestration appeals, a general finding of expenses in the Inner House, or by the Lord Ordinary, includes the expenses of the inferior Court (*Darling*, 1852, 14 D. 347; *Kerr*, 1845, 7 D. 809). The expense of a petition for the recall of a sequestration will not be awarded to the petitioner (*Smith Bros. & Co.*, 1860, 23 D. 140).

E. *Expenses of Cessio.*—The expense of obtaining the decree and of the disposition *omnium bonorum* shall be paid out of the readiest of the funds thereby conveyed (Debtors Act, 1880, s. 9 (6)). The expenses of an unsuccessful opposition to a petition will not be awarded against the petitioner, if the Court is of opinion that his action in bringing it was justifiable (*Wright*, 1856, 18 D. 576). The trustee in a cessio is personally liable, just as is a trustee in a sequestration (*Bell*, 1842, 5 D. 162).

#### EXPENSES UNDER STATUTES.

1. *Lands Clauses Act*, 1845.—When any question of disputed compensation arises, the parties may refer the matter to arbitration, the whole expense of which falls on the promoters, unless they shall have tendered a sum as large as the amount awarded by the arbiter (s. 32). The Auditor of the Court of Session may tax the expenses, if either party so desires (30 & 31 Vict. c. 126, s. 37). The award of the arbiter as to expenses is final. If no compensation is awarded, sec. 32 does not apply. If the question be tried by a jury, the expense falls on the promoters, unless a tender be made larger than the award (s. 50; *Mellevén's Executors*, 1851, 13 D. 1262), in which case the opposite party may be called upon to pay one-half of the company's expenses. (As to what is included in "Expenses of Inquiry," see *Younger*, 1847, 10 D. 133, and *Sligo v. Caledonian Railway Coy.*, referred on in *Deas on Railways*, p. 331, note.) When the compensation is determined by a valuator, the

expense falls on the promoters (ss. 60, 63, 66). When the compensation is consigned in terms of the Act, the Court may order the following expenses to be paid by the company (s. 79): (a) The expense of the purchase or taking of the lands (*Primrose*, 1848, 11 D. 236); (b) the expense of investment of the money, or of employing the money as may seem best to the parties interested, as, for example, paying off the expense of improvement on the entailed estate (*Grant*, 1851, 13 D. 1015); (c) the expense of obtaining the proper orders for the above purposes (*Countess of Stair*, 1882, 19 S. L. R. 618), and of the orders for payment of dividends, etc.; (d) the expense of one application for reinvestment in land, and only one as a rule (see, however, *Grant*, 1851, *supra*; *Logan*, 1889, 26 S. L. R. 521). The expenses of conveyances of land fall to be borne by the promoters (s. 81): the expense of making up a title is not covered by this section: that falls to be done at the expense of the seller (*Graham*, 1848, 10 D. 495; but see *Miles*, 1867, 5 M. 402). If the parties are not agreed on the expenses of conveyance, the amount falls to be ascertained by the Lord Ordinary, on summary petition, and is recoverable by poinding and sale (s. 82). Where an heir of entail, part of whose land had been taken by a railway company, obtained authority to uplift the money consigned, and to apply it in payment of a bond and disposition in security over the estate, the railway company was held not liable for the expenses incurred in connection with the preparation, execution, and recording of a partial discharge and deed of restriction by the creditor in the bond (s. 79: *Stirling Stuart*, 1893, 20 R. 932). In arbitration proceedings under the Lands Clauses Act, the company is liable for the whole of the arbiter's fee (*Macandrew, Wright, & Murray, W.S. v. N. B. Rwy. Co.*, 1893, 1 S. L. T. 183).

2. *Entails Acts*.—Under the Entails Acts it is competent for the Court to award expenses against any of the parties to the proceedings, and to decern for payment out of the estate. Expenses, however, are not usually asked by the petitioners, except in petitions to sell and in applications to uplift and apply trust funds (*Willoughby D'Eresby*, 1885, 13 R. 70. For expenses of reinvesting consigned money, see *Glover*, 1893, 30 S. L. R. 658). The petitioner is not allowed any expenses beyond what would have been allowed to him under the Lands Clauses Act (*Johnstone*, 1885, 12 R. 468; *Hay*, 1873, 1 R. 180). In entail proceedings, all persons raising questions have to bear their own expenses (*Macdonald*, 1879, 6 R. 1011; *Pringle*, 1892, 19 R. 926). See also *ENTAIL*.

3. *Merchant Shipping Acts*.—A shipowner is liable in the expense of an application to have his liability limited (25 & 26 Vict. c. 63, s. 54; *Burrell*, 1877, 4 R. 1133; *Currie*, 1883, 20 S. L. R. 412), but he is not liable for the adjustment of claims caused by the competition of claimants (*Carron Co.*, 1885, 13 R. 114). The expenses of arbitrations as to salvage are dealt with by sec. 460 of the Merchant Shipping Act, 1854. (See also *Larson*, 1888, 15 R. 753.)

#### TEIND COURT EXPENSES.

In strictly judicial proceedings, the ordinary rules as to expenses are followed. In ministerial or discretionary proceedings, the minister pays his own expenses, whether the heritors oppose or not: so do the heritors, whether successful or not. If a common agent be required, his expenses are paid by the heritors according to the respective value of each heritor's teinds (*Mags. of Glasgow*, 1871, 9 M. 520). Where none of the heritors possess the teinds, and the surplus teinds are annually collected by

the titulars, the latter should put in a state of the teinds and furnish the minister with a locality, thus saving the expense of a common agent. In such cases the titulars sometimes bear the expense, but the heritors are strictly liable.

#### JUSTICIARY COURT.

In reviewing a conviction, the High Court may award, refuse, or modify expenses, as it thinks proper. To save the expense of taxation, a modified sum is usually allowed. There seems to be no reported case where a panel has been awarded his expenses on his acquittal in a prosecution at the instance of the Lord Advocate (Hume, vol. ii. p. 134, note 1). A Procurator-Fiscal, apart from the provisions of the Summary Procedure Act, is in the same position as a private person. It is competent for the High Court to award expenses in both Courts against a Procurator-Fiscal (Moncreiff on *Review*, p. 184). The Summary Procedure Act (s. 22) provides that expenses shall not be awarded to or against the public prosecutor, unless such an award be expressly or by implication authorised by the special Statute under which the prosecution has been brought (*Ross*, 1869, 1 Couper, 336). If an inferior Court judge is authorised to award expenses against the accused, he may likewise award them against the prosecutor (*Todrick*, 1891, 18 R. (J. C.) 41).

#### REGISTRATION COURT.

Expenses are not awarded in the Registration Court except to respondents where the Sheriff's judgment is affirmed (*Brown*, 1868, 7 M. 281). In practice, these expenses are modified at £3, 3s. Witnesses in registration cases are allowed the same fees as in ordinary cases.

#### SHERIFF COURT.

The rules as to expenses in the Court of Session are, in general, applicable to the Sheriff Court. There are, however, certain differences. In the Sheriff Court, expenses must be concluded for (39 & 40 Vict. c. 70, Sched. A, note). The Sheriff must determine the question of expenses in pronouncing judgment (A. S. 10 July 1839, s. 62). The Sheriff should make an express finding of expenses when affirming his Substitute, if he means to award them in his Court (*Macdonald*, 1880, 7 R. 574). Interim awards of expenses are made when it is considered expedient to dispose of the expense of any particular step in a case (*Dove Wilson's S. C. Practice*, 4th ed., 189). The power to dispose of the expenses of discussing preliminary pleas is regulated by A. S. 10 July 1839, s. 40. Final expenses are awarded in the interlocutor disposing of the merits (*Wallace*, 1876, 4 R. 264). If a cause has been exhausted and no finding for expenses made, it is incompetent for the Sheriff to pronounce an interlocutor, later, dealing with them (*Drummond*, 1869, 8 M. 277). Where the Sheriff acts in a purely administrative capacity, he cannot award expenses unless expressly authorised to do so (*Buckhaven Boundaries*, 1891, 7 S. L. Review, p. 141). In Sheriff Court proceedings, there are two scales of taxation (A. S. 4 December 1878, Gen. Reg. I.). For regulations as to taxation, see the same Act of Sederunt, and also A. S. 10 July 1839, ss. 105–107. For expenses in the Small Debt Court, see Lee's *Small Debt Handbook*. Whenever the sum sued for in the Sheriff Court does not exceed the sum which may be competently concluded for in the Small Debt Court, no fees shall be allowed except those authorised by the Small Debt Act (A. S. 4 December 1878, Gen. Reg. 1).



## HOUSE OF LORDS.

*A. Interim Execution pending Appeal to.*—When an appeal is lodged in the House of Lords, the Inner House has power to deal with the payment of costs and expenses already incurred (48 Geo. III. c. 151, s. 17). An order for interim execution for expenses will be granted, whenever the Court is of opinion that the party petitioning is acting *in bonâ fide* (*McBeath*, 1887, 15 R. 8; *Cochrane*, 1849, 12 D. 302): even though the other party can afford a perfectly good guarantee (*Steel Co. of Scotland*, 1889, 26 S. L. R. 465), or states that he is applying to the House of Lords to be admitted to the poor roll (*Clark*, 1895, 33 S. L. R. 289), and even if the account be not taxed or decreed for (*Medwyn*, 1829, 7 S. 837); not, however, where there is no appeal on the question of expenses (*Forster*, 1871, 9 M. 829). The expense of the order granting interim execution is a good item against the opposite party (*Symington*, 1877, 4 R. 993). The Court may, and usually does, however, order caution to repeat (*Duke of Hamilton*, 1878, 5 R. 588; but see *A. B.*, 1884, 11 R. 1060). When the appeal is successful, application for repayment may be made in the petition to apply the judgment. Interest will not be allowed unless the House of Lords expressly orders it, or unless it is provided for in the bond of caution (*Fleming*, 1868, 7 M. 79; *Young*, 1892, 19 R. 867). The Court hearing the petition for interim execution must consist of four judges (*Young*, 1852, 14 D. 746: 48 Geo. III. c. 151, s. 17).

*B. Expenses in House of Lords.*—In the event of an appeal, security must be given (Appellate Jurisdiction Act, 1878). The rules as to expenses in the House of Lords are similar to those in the Court of Session. The House of Lords occasionally remits to the Court of Session to determine questions of expenses. When the House of Lords reverses the Court of Session, and remits to proceed with the cause, the Court of Session may deal with expenses, if the House of Lords did not exhaust the cause (*Saver's Executors*, 1873, 11 M. 451; *Jenkins*, 1868, 6 M. 951; *Western Bank*, 1865, 4 M. 97). If a party appeal *in forma pauperis* and is successful, the interlocutor of the House of Lords will be in this form: "That the respondents do pay, or cause to be paid, to the appellant, such costs in this House as have been incurred by the appellant in appearing *in forma pauperis*, the amount of such last-mentioned costs to be certified by the Clerk of the Parliaments" (*Mackie*, 1884, 11 R. (H. L.) 10). The expense of the petition to apply the judgment of the House of Lords is allowed (*Watt*, 1874, 1 R. 1122). But where the judgment of the House of Lords is simply an affirmation of the interlocutor appealed against, a petition to apply the judgment is not necessary, and the expense of such petition will not be allowed (*Peters*, 1893, 20 R. 924). Where the Court, in affirming an interlocutor of a Lord Ordinary appointing a *curator bonis*, made no finding as to expenses, and the House of Lords subsequently affirmed, with certain findings as to expenses, the Court, on a note by the *curator bonis*, held that they also must give similar expenses in the Court of Session (*Mitchell & Baxter*, 1891, 19 R. 324).

## FEES TO COUNSEL.

Fees to counsel are allowed for drawing the summons and defences, except in ordinary petitory actions: to senior counsel, for revising in cases of difficulty (*Nixon*, 1882, 20 S. L. R. 160); to juniors, for all motions; and to seniors, for difficult motions, and for debates and advisings. A fee has been allowed for consultation prior to debate (*Stewart*, 1873, 11 M. 467). Fees are allowed for preparing interrogatories (*Scougall & Ellis*, 1860, 22 D.



870), and for moving the approval of the Auditor's report in the Inner House. No fee is allowed for opinion as to the advisability of raising an action (*Dougall*, 1834, 12 S. 532); nor, as a rule, for opinion as to defending (but see *Black*, 1831, 9 S. 429). Fees, as a rule, are not allowed to counsel at the examination of havers (*Fairley*, 1836, 14 S. 470), but in important commissions they are allowed (*Alison*, 1856, 18 D. 851). Refreshers are allowed where the Court has not been able to take up a case at the close of session (*Mathieson*, 1853, 16 D. 106). The practice as to refreshers has been recently stated to be this: "At one time counsel got refreshers as if a day which was partially occupied had been a whole day, irrespective of the proportion which the particular part might bear to a whole day. The proper view, however, which now prevails, is that the whole time which has been occupied by the hearing is to be taken into account in fixing the amount of counsel's fees. At the same time, it is sufficiently obvious that a case which, for example, has occupied a solid three hours on a single day, may give counsel less trouble than it would have done had the same time been split up between two days" (*Baird & Stevenson*, 1892, 19 R. 1061, per the Lord President). A retaining fee is never a charge against the opposite party. In proofs and jury trials it is the practice to allow junior counsel a fee for advising as to the line of proof, and fees to both senior and junior counsel for advising as to the sufficiency of the evidence. A fee to senior counsel for consultation as to the form of issues has been allowed (*Gardiner*, 1851, 13 D. 843). In one case fees for consultation prior to the Inner House debate were held to be a good charge against the opposite party (*Stewart*, 1873, 11 M. 467). Consultation fee as to tender is a good charge (*McDougall*, 1878, 5 R. 1011). Fees to counsel form a proper charge, even if not sent till after judgment (*Sim*, 1889, 16 R. 583; *Batchelor*, 1876, 3 R. 1086). Fees to one counsel only are allowed in Outer House motions, in the single bills, and in drafting pleadings. Where a motion in the Inner House is important, two counsel may be allowed (*Cravencour*, 1844, 6 D. 762). A fee to senior counsel prior to closing the record is allowed wherever there is any serious question at issue (*Arthur*, 1895, 22 R. 904; see, however, *Keating*, 1894, 1 S. L. T. 628). Only one counsel is allowed, as a rule, in the adjustment of issues (*Stevenson*, 1832, 10 S. 337). In the Inner House, and in the Procedure and Debate Rolls of the Outer House, two counsel are allowed (*Lord Advocate v. Raynes, Lupton, & Co.*, 1859, 21 D. 863). As a rule, fees are not allowed to more than two counsel. "The kind of case in which the fees of three counsel are chargeable against the unsuccessful party, are cases in which there may be a subdivision of labour, as in the case of a heavy trial by jury" (*Padwick*, 1874, 1 R. 697). When two counsel have been conducting a case, and a third has been called in, the rule followed by the Auditor is, to allow the fees of the two counsel employed throughout, and to disallow the fees of the third counsel called in (*Wilson*, 1873, 1 R. 304; but see *Symington*, 1874, 1 R. 1006). The amount of the fee is, in the first instance, a matter for the discretion of the agent, subject to the revision of the Auditor (*Tough's Trs.*, 1874, 1 R. 879), and, in the last instance, to the interference of the Court. In jury trials the following fees may be taken as representing the usual sums allowed: Senior counsel, twenty guineas for the first day, fifteen for the second, and ten guineas thereafter; junior counsel, fifteen, ten, and seven guineas (see Monteith Smith on *Expenses*, 308-302, and Appendix—Forms of Judicial Accounts). The amount, however, is in the discretion of the Auditor, with which the Court will be slow to interfere; the case must be a very exceptional one (*Blair*, 1894, 21 R. 23). By A. S. 6 March 1883, it is provided that the charge

for papers drawn by counsel will be allowed only where the Sheriff shall sanction the employment of counsel. See also A. S. 2 June 1837, A. S. 10 March 1849, and A. S. 4 Dec. 1878. Without the Sheriff's approval the fees paid to counsel are only allowed to the extent to which they would have been chargeable for procurators. Counsel have no right to sue for their fees.

## WITNESSES.

Fees to witnesses are regulated by A. S. 15 July 1876. They require to be stated in a special schedule appended to the account. The expenses of witnesses form a good charge against the unsuccessful party. Witnesses who do not reside in the town where the trial is, are allowed expenses for time necessarily occupied in going to, remaining at, and returning from the place of trial (*Butchart*, 1859, 22 D. 184; *Wilcox & Gibb's Sewing Machine Co.*, 1869, 7 S. L. R. 98). A witness examined on commission is entitled to his expenses (*McDonald*, 1839, 1 D. 677). The expense of witnesses not examined will not be allowed, unless a good and valid reason shall be assigned for their non-examination. Wherever a party has good ground for believing that damaging matter is to be brought up against him, the expense of witnesses, though not examined, is a good charge (*Hubback*, 1864, 2 M. 1291). As to unexamined witnesses, a defender is in a different position from a pursuer: the latter ought to know his case, and bring forward no more witnesses than will prove it (*Campbell*, 1848, 11 D. 325). The expenses of precognoscing witnesses are not included in "Expenses of Process," subject to this proviso, that precognitions (so far as relevant and necessary for proof of the matters in the record between the parties), although taken before the raising of an action or the preparation of defences, and although the case may not proceed to trial or proof, may be allowed where eventually an interlocutor shall be pronounced either approving of issues or allowing a proof (A. of S. 15 July 1876, Gen. Reg. 3). This proviso does not apply to the Sheriff Court (*Church*, 1883, 11 R. 398). The expense of two precognitions of the same witness is not allowed (*Watsons*, 1839, 1 D. 361). Where it is necessary to employ professional or scientific persons, in order to qualify them to give evidence at a trial, such additional charges shall be allowed as may be considered fair and reasonable, provided that the judge who tries the cause shall certify that it is a fit case for such additional allowances (A. of S. 15 July 1876). The presiding judge alone can give this certificate (*Tough's Trs.*, 1874, 1 R. 879). It is difficult to lay down rules as to the circumstances in which such a certificate will be granted. No extra remuneration will be allowed unless an investigation of the facts of the particular case has been made (*Ferguson*, 1886, 13 R. 635. An important case upon this question is that of *Hubback*, 1864, 2 M. 1291). The amount of allowances to scientific witnesses for investigations prior to trial is not dealt with in the Act of Sederunt: it is entirely in the Auditor's discretion (*Duke of Buccleuch*, 1867, 5 M. 1054; *Reid*, 1847, 9 D. 487). Allowances during trial are also practically in the Auditor's discretion, and the Court will be slow to interfere (*Reid*, 1847, 9 D. 487). The rule as to medical experts is dealt with in *Stewart v. Padwick*, 1873, 11 M. 467. As to fees to be paid to English counsel who act as witnesses, see *Parnell*, 1890, 17 R. 552. They are to be recognised as experts, not merely witnesses on questions of fact (see also *Whitehaven and Furness Junction Railway Co.*, 1851, 13 D. 944). The principles laid down in the case of *Stewart v. Padwick* were followed in the recent case of *A. B. v. C. D.*, 1894, 22 R. 186, where two eminent medical men were allowed 125 and 100 guineas re-

spectively. Where a defender was unable to be present through age, the expense of a doctor's attendance, in order that an affidavit of her inability to be present might be given, was allowed (*Scott*, 1894, 32 S. L. R. 39).

#### MISCELLANEOUS FEES AND EXPENSES.

Fees to agents for their own and their clerks' services are regulated by A. S. 15 July 1876. Where there is a country agent as well as a town agent, it is now competent for them to share fees (36 & 37 Vict. c. 63, s. 21). *Commissioners*.—Both parties are conjunctly and severally liable for fees of commissioners or judicial reporters, and of all persons authorised to do anything by the Court (*Ballantine*, 1884, 22 S. L. R. 136). The agent will not be personally responsible to a reporter for payment of his fees. The amount of a commissioner's fee varies in accordance with the extent and difficulty of the work entailed (*Tannett, Walker, & Co.*, 1874, 1 R. 440). There is no general rule, and the Court leaves it to the discretion of the Auditor (*Owners of the "Hilda,"* 1885, 12 R. 547). *Accountants*.—In remits, there is no scale. An accountant may retain his report until his fee is paid (*Peddie*, 1860, 22 D. 707). Fees for going over books by an accountant during the preparation of a record have sometimes been allowed (*Inglis*, 1861, 23 D. 872; *Ruilton*, 1847, 9 D. 1140). *Arbiters*.—The presumption is that an arbiter acts without remuneration; but this presumption is capable of being redargued (*Henderson*, 1867, 5 M. 628). Usually the parties agree beforehand that they will be jointly and severally liable for the arbiter's fee (*Fraser*, 1838, 16 S. 1049). An arbiter may refuse to hand over his report until payment (*Brodie*, 1836, 14 S. 1097). *Judicial Referee*.—The presumption that, apart from agreement, an arbiter is not entitled to remuneration, does not apply to a judicial referee (*Baxter*, 1838, 16 S. 1085). *Copies* of the necessary documents produced in the cause for the use of counsel will always be allowed, but not copies of the evidence, unless there has been an adjournment of the proof on special cause shown (*Powrie*, 1881, 8 R. 803; *Birrell*, 1868, 6 M. 421).

[Monteith Smith on *Expenses*; Mackay, *Pract.* vol. ii. p. 528.]

**Expert.**—See OPINION EVIDENCE; COMPARATIO LITERARUM.

**Expiry of the Legal.**—See ADJUDICATION.

**Explosive Substances.**—The law relating to *explosive substances* is for the most part contained in various Acts of Parliament, principally 38 & 39 Vict. c. 17, and 46 & 47 Vict. c. 3. The first of these Statutes deals with the manufacturing, keeping, selling, carrying, and importing thereof, and the second with felonious intrusions with the same.

The first—the Explosives Act, 1875—may be shortly summarised as follows: It applies not only to gunpowder, dynamite, and the more serious explosives, but also to such minor explosives as fog-signals, fireworks, rockets, percussion caps, etc. (s. 3). Part I. deals with gunpowder. Except when made experimentally, it must be manufactured only at a factory lawfully existing or licensed under the Act. When made otherwise, it is subject to forfeiture and fine (s. 4). It must be stored in authorised places, except when for private use to the extent of thirty pounds in one place, or when being conveyed (s. 5). Application for a licence for a



new factory or magazine must be made and granted in a prescribed form (ss. 6-8). Regulations and general rules are laid down for the maintenance of such factories or magazines (ss. 9 and 10), and for workmen therein (s. 11). Amended licences may be applied for if alteration is desired (s. 12): and on notice being given of change of occupancy, or discontinuance not exceeding two years, the same licence applies (s. 13). Factories or magazines existing before the Act must be held by continuing certificate (s. 14). Store licences are to be obtained from the local authority (s. 15). Orders in Council may from time to time be issued prescribing the situation and construction of stores (s. 16), and general rules for stores are laid down (s. 17). A store licence is not transferable, and must be renewed annually according to form (s. 18). Special rules may be made by the occupier for workmen in a store (s. 19). Secs. 21 and 22 deal with the retailing of gunpowder. The premises must be registered with the local authority (s. 23), and maintained according to general rules (s. 22). Due precautions against fire or explosion must be taken by the occupier of every factory, magazine, store, or registered premises (s. 23). With regard to this section, it has been held that the question whether due precaution in the sense of this enactment had been taken was a question of fact only, which consequently could not competently form the subject of an appeal under the Summary Prosecutions Appeals Act, 1875 (*Dykes*, 1885, 12 R. (J. C.) 17). Sec. 24 regulates the quantities of gunpowder to be allowed in buildings, which may be referred to arbitration, concerning which regulations are provided (s. 25). Sec. 26 specifies fees for licences. Adjoining buildings are counted as one (s. 27), and the local authority must keep a register of stores and registered premises (s. 28). In case of the death, bankruptcy, or incapacity of the occupier of a store or registered premises, the business may be carried on by another without penalty till a new licence is obtained (s. 29). Hawking of gunpowder (s. 30), and sale thereof to children under thirteen (s. 31), are forbidden. Gunpowder exceeding 1 lb. must be sold in closed packages, labelled. Sec. 33 contains general rules as to packing of gunpowder for conveyance, and secs. 34, 35, and 36 provide that all harbours, railway and canal companies, and wharves, shall have bye-laws as to the conveyance, loading, etc., thereof. The Secretary of State may make or alter bye-laws as to conveyance by road or otherwise, when the above do not apply (s. 37).

Part II. relates to other explosives. Except as modified, the provisions relating to gunpowder (Part I.) apply (s. 39). The modifications consist in different requirements of particulars in draft licences (s. 40 (1)), prescribed general rules in place of general rules relating to factories, magazines, stores, and registered premises (2), rules relating to packing (3), maximum amount to be kept privately and minimum amount to be sold unenclosed (4), keeping of different explosives in the same store (5), amount of gunpowder to be kept with other explosive (6), prescribed general rules thereon (7), labelling of explosive (8), and provisions regarding importation and conveyance (9). Sec. 41 excludes from the provisions of the Act the filling and conveying of safety cartridges for private use, to the amount allowed, and sec. 42 extends the provisions relating to gunpowder in 18 & 19 Vict. c. 119, s. 29, and 36 & 37 Vict. c. 85, ss. 23-27, to all explosives. Specially dangerous explosives may be, by Order in Council, either absolutely prohibited or subjected to extraordinary conditions. Sec. 44 contains provisions in favour of makers and retailers of blasting cartridges, and sec. 45 provisions in favour of makers of new explosives for experiment. An occupier of a magazine, store, or registered premises does not need a factory



licence in respect of his making or selling cartridges for small-arms (s. 46) or blasting-charges (s. 47), provided he observes certain conditions. Sec. 48 provides for exemptions from licence as "small firework factory," and sec. 49 provides for licence as "small firework factory." No licence is required for keeping of percussion caps, safety fuses for blasting, or fog signals kept by a railway company.

Part III. relates to the administration of law. Government inspectors are to be appointed (s. 53), from which office all connected with the business of explosives are barred (s. 54). Secs. 55 and 56 detail their powers. Sec. 57 provides for an annual report to the Government of inspectors' proceedings, and sec. 58 for inspection by railway inspectors or inspectors of the Board of Trade, according to order. Inspectors under the Coal Mines Regulation Act, 1872 (35 & 36 Vict. c. 76), and under the Metalliferous Mines Regulation Act, 1872 (*ib.* c. 77), may be ordered to act as Government inspectors (s. 59). A copy of a licence or rules under this Act, certified by a Government inspector, shall be evidence (s. 60). A Government inspector may keep and carry samples of a reasonable amount (s. 61), and the salaries of Government inspectors and expenses of the Act are to be paid from public moneys (s. 62). Sec. 63 provides for notice of accidents, and sec. 64 for permission to reconstruct buildings destroyed thereby. Sec. 65 gives provisions for coroners' inquests on deaths from accidents connected with explosives, and sec. 66 for inquiry into accidents, and formal investigation in serious cases (see Fatal Accidents Inquiry (Scotland) Act, 1895, 58 & 59 Vict. c. 36). Secs. 67 and 68 define the local authority. (For local authority in Scotland, see sec. 110 *et seq.*, *infra.*) Sec. 69 defines their duties, and sec. 70 provides for their expenses. Sec. 71 relates to the undertaking of carriage by harbour authorities and canal companies, and sec. 72 to the provision of magazines by the local authority. A power of search is given for explosives when explosives are in a place in contravention of the Act, or in the event of any breach of it (s. 73), and a power of seizure (s. 74). Sec. 75 provides for inspection of explosives *in transitu*, and sec. 76 for the payment of explosives taken as samples.

Part IV. contains supplemental provisions relating to legal proceedings, exemptions and definitions. Trespassers may be removed and fined (s. 77), and persons committing dangerous offences seized without warrant (s. 78). Sec. 79 provides for imprisonment for a wilful act or neglect endangering life or limb, and secs. 80-82 punishments for throwing fireworks in thoroughfares, forgery, and falsification of documents, and defacing notices. Sec. 83 contains provisions as to Orders in Council, and orders by the Secretary of State, and secs. 84 and 85 as to publication of bye-laws, notices, etc., and service thereof. The occupier is to be exempted from penalty on proof of another being the real offender (s. 87); and carriers, etc., likewise, where the consignee, etc., is in fault (s. 88). Sec. 89 contains supplemental provisions as to the forfeiture of explosives. Sec. 90 defines the jurisdiction in tidal waters or on boundaries. Prosecution of offences may be either summary or on indictment (s. 91), though in certain cases the offender may elect to be tried on indictment (s. 92). Sec. 93 provides for appeal; sec. 94 for the constitution of the Court; and sec. 95 for the distress or arrestment of a ship to pay a penalty. Sec. 96 provides for the application of penalties and forfeitures. Sec. 97 exempts from the provisions of the Act Government property in factories (1); ships or carriages (2); volunteer stores (3) and (4); and in conveyance (5). Sec. 98 exempts rocket and fog stations, and sec. 99 magazines in the Mersey; while secs. 100 and 101 provide savings for masters of ships and carriers, and rockets, gun-

powder, etc., on board ships. The Act does not exempt from liability persons committing nuisances, etc., not provided against (sec. 102), and powers given under it are cumulative (s. 103). Secs. 104–108 contain definitions, and secs. 109–118 modifications, in the application of the Act to Scotland. The local authority in Scotland is laid down (s. 110) as magistrates in boroughs, harbour authorities in harbours, and justices of the peace in counties. By 52 & 53 Vict. c. 50, s. 11 (5), the administrative power in counties is transferred to county councils.

The second Act (46 & 47 Vict. c. 3) provides punishment, by penal servitude or imprisonment, for causing an explosion likely to endanger life or property (s. 2); or for attempt to cause an explosion, or for keeping explosive substances with intent (s. 3); or for making or possessing explosives under suspicious circumstance (s. 4), or being accessory thereto (s. 5). Sec. 6 provides for an inquiry by the Lord Advocate, and the apprehension of absconding witnesses, and sec. 7 provides that no prosecution shall take place except by leave of the Lord Advocate. Search for and seizure of explosive substances may be made for the purposes of detection, as provided in 38 & 39 Vict. c. 17, ss. 73, 74, 75, 89, and 96, and for said purposes a master or owner of a vessel may act as provided in 36 & 37 Vict. c. 85, for safety (s. 8).

Further regulations concerning explosive substances are contained in other Acts of Parliament. In 39 & 40 Vict. c. 36, s. 139 (customs), it is provided that any exporter and shipper of a package containing explosives shall duly enter the same before shipment, with a correct description, on pain of forfeiture and a penalty of £100. By 46 & 47 Vict. c. 10, s. 3, all explosive substances are held to be restricted goods. In 52 & 53 Vict. c. 42, s. 4, it is provided that the conveyance of explosives, within the meaning of 38 & 39 Vict. c. 17, and 46 & 47 Vict. c. 3, from the Isle of Man to England and *vice versa*, are to be deemed exportation and importation, and all the provisions of the Customs Acts shall apply. 57 & 58 Vict. c. 60, s. 301, deals with restrictions on carriage of explosives in passenger ships, and secs. 446–450 on restrictions on carriage in ships generally. 40 & 41 Vict. c. 65 deals with the use of dynamite or other explosives to catch or destroy fish in a public fishery, and with the trial of offences on the sea-coast or at sea. There may be prohibition by proclamation, or Order in Council, of exportation of ammunition, etc. (42 & 43 Vict. c. 21, s. 8), and of importation (39 & 40 Vict. c. 36, s. 43). The placing of explosives in a letter-box, or sending them by post, is punishable under 47 & 48 Vict. c. 76). The powers given in the Coal Mines Regulation Act, 1887, to modify special rules are extended to rules dealing with explosives (59 & 60 Vict. c. 43, s. 1 (1) *b*); and the Secretary of State, on being satisfied that any explosive is, or is likely to become, dangerous, may restrict its use, or forbid it (*ib.* s. 6).

**Exposing Children.**—If a child is exposed and deserted under such circumstances as to indicate a design of destroying it, the crime is murder (*Kerr*, 1860, 3 Irv. 645). See CHILD-MURDER. To expose and desert a child under circumstances which do not point to intent to destroy life is a criminal offence, punishable by an arbitrary sentence. And it is criminal fully to expose a child to danger, though there be no desertion (*Gibson*, 1845, 2 Broun, 366).

The prevention of cruelty to children has been the subject of legislation (52 & 53 Vict. c. 44, amended by 57 & 58 Vict. c. 27; both repealed, and

the law as to prevention of cruelty to children consolidated, by 57 & 58 Vict. c. 41).

[Hume, i. 299; Alison, i. 162; Maedonald, 173.]

See CRUELTY TO CHILDREN, PREVENTION OF.

**Expromissor.**—When a creditor agrees to accept a third party as his debtor in a debt in place of the former debtor, the new debtor thus substituted is known as an *expromissor*. The effect of the undertaking of an *expromissor* is to discharge the obligation of the former debtor. Thus, *expromissio* was a recognised mode of extinguishing obligations. (Stair, i. 17. 3; Ersk. iii. 3. 61, and iii. 4. 22). See ADPROMISSOR.

**Extent, Old and New.**—Extent is an old Scots law term, and means the annual value put on lands for the purpose of assessing public burdens and fixing the amount of relief and non-entry duties. There were two such values or extents—the old and the new. Sometimes the expression used was that of old and new retour, from the retour or verdict returned by the jury to the old brieve of inquest. These brieves of inquest, which were in use until 1847, contained, as one of the heads or questions on which the jury was to give a verdict, the question, “how much the said lands are now worth a year (new extent), and how much they were worth in the time of peace (old extent) (‘Quantum valent dictæ terræ et annui redditus cum pertinentibus nunc per annum et quantum valuerunt tempore pacis’).” The explanation of how this head of the brieve of inquest came to be used, which is now generally adopted, is that given by Lord Kames and accepted by Erskine.

In early times “taxes were no part of the constitution of any feudal Government. The king was supported by the rents of his property-lands and by the occasional profits of superiority, passing under the name of casualties. These casualties, such as ward, non-entry, marriage escheat, etc., arose from the very nature of the holding, and beyond these the vassal was not liable to be taxed:—some singular cases excepted established by custom, such as for redeeming the king from captivity, for a portion for his eldest daughter, and a sum to defray the expense of making his eldest son a knight. For this reason it is natural to conjecture that the first universal tax was imposed upon some such singular occasion.” It is not known when such an occasion first arose; but a general tax was raised in 1281, during the reign of Alexander III., in order to provide a marriage portion for his daughter Margaret on the occasion of her marriage with Eric, King of Norway. After the death of Alexander III. there occurred the War of Independence, during which the country was devastated by the English. Subsequently, in 1326, in order to grant an aid to the king, Robert the Bruce, Parliament agreed to give him for his life a tenth penny of all the rents of the country according to the old extent of the lands and rents in the time of Alexander III. From this it is conjectured that the extent of 1281 is the old extent of the retour. This is confirmed by the circumstance that the agreement of 1326 contained the following exception: “Excepta tantummodo destructione guerre in quo casu, fiet decidentia de decimo denario prececoncesso secundum quantitatem firme, que occasione predicta de terris et redditibus predictis levare non poterit, prout per inquisitionem per vicecomitem loci fideliter faciendam poterit repitiri,” which shows that a deduction was to be made



in the extent of such lands as had suffered in the war. It is to this valuation that the term new extent was first applied. It is also generally believed that until 1326 retours contained only one extent. If this be so, we see a good reason for the double inquiry in the brieve, for the clause "*quantum nunc valent*" would in the case of many lands be different from that previously made *tempore pacis*. The new extent would thus naturally at first be much less than the old extent; and we find that this was so. The next occasion, or at anyrate an occasion, on which a general tax was again imposed,—for a similar tax seems to have been imposed in 1365,—was that raised to pay the King of England the amount due him for the maintenance of King James I. The amount was raised by Parliament in 1424, and it is clear from extant retours made at that date that two extents were given. Extant retours also show that for a long time after the valuation of 1326 the new extent continued to be less than the old. This came to be considered a grievance, on account of the great rise in the value of land; and accordingly the Act 1475, c. 55, was passed. It enacted: "Anent the brieves of inquest to be served in time to come. It is statute and ordained that it be answered in the retour quhat the land was of availe of the auld and the very availe it was worth and gives the day of the serving of the said brieve." On this Statute two remarks fall to be made: one is, that from this time at anyrate there is no ground for conjecture as to what the old extent means, for the old extent in all retours is certainly the old extent referred to in this Statute. And for the reasons that have been already given, the old extent in retours was probably the one made in the reign of Alexander III., and never altered afterwards. The other remark is that the new extent, so far as it practically affected feudal casualties, was really introduced by this Statute. Land had come to be far above the value of the former new extents, and accordingly we always find in retours since 1474 that it is higher than the old extent. It is true that the rule contained in the Statute did not long continue to be observed; for after land had been once valued by an inquest, and it generally was valued at quadruple the old extent, the extent thus ascertained was ever after inserted in the retour as the new extent, which, though much higher than the old extent, was yet short of the true value.

The old extent might, after this date, have ceased to appear in retours, were it not that conveyancers were averse to alter the style of the brieve. It, however, continued to be of importance for two reasons, namely: (1) Public burdens continued to be raised on land according to the old extent, a certain proportion being imposed on the lands of A., being the forty-shilling land of old extent, and a certain proportion on the lands of B., being the five-merk land of old extent, and so on. This continued to be the rule until the valued rent was finally introduced by the Act of Convention of 1667. (2) Until the Reform Act of 1832 only those were entitled to be enrolled as electors and vote at elections in counties in Scotland who were "publicly infeft in property or superiority and in possession of a forty-shilling land of old extent," or, where the old extent could not be proved, infeft in lands worth four hundred pounds of valued rent (Act 1681, c. 21). During this period many cases affecting the old extent are to be found in Morrison *rocc* "Member of Parliament." They are, however, now of only antiquarian interest. Since 1832, the old extent has ceased to have any importance.

The new extent, on the other hand, was the value taken in fixing the casualties of non-entry and relief due prior to citation, and it was to prevent these being too heavy that the Act of 1475, c. 55, came, as



already noticed, to be evaded. The new extent was never of any interest in lands held feu, for the feu-duty was the new extent. But it continued to be of importance in the case of lands held ward and blench.

[Kames, *Hist. Law Tracts*, xiv. E. 2. 5. 31-4; Wight on *Elections*, 160; Bell on *Elections*, 154; Duff, *Feudal Conveyancing*, 462.]

**Extent, Writ of.**—A Writ of Extent, or Extent as it is usually called, is the name of the process which was introduced into Scotland after the Union in order to give the Crown, on behalf of the public, a speedy remedy for recovering moneys due to the revenue, and which, without such speedy means of recovery, might be lost.

*Extent in Chief in the First Degree.*—Prior to the Union, the Crown's rights in respect of import or export duties and other debts were, under various Acts of the Scots Parliament, enforced by letters of horning, under which debtors to the king were charged to pay. The Crown had, besides, a hypothec over all goods subject to duty (*Peebles*, 1631, M. 11824). By Art. XIX. of the Treaty of Union it was agreed that a Court of Exchequer should be established in Scotland for deciding questions concerning the revenue, having the same authority as the Court of Exchequer in England. This Court was instituted by 6 Anne, c. 26. Sec. 7 of this Statute enacts that the Court shall have full power to take all manner of recognizances and securities for debts due to the Crown; that all recognizances, specialties, and other securities for revenue debts shall have the same force as similar obligations taken in the Court of Exchequer in England, according to the true meaning of the Statute 33 Hen. VIII. c. 39, or other English laws or customs; and that Crown debtors in Scotland shall be liable, by Extent, Inquisition, and Seizures, or other process, for the payment of such debts. This Statute thus introduces the English law, as regards the recovering of Crown debts, and the preference accorded to the Crown in competition with subject creditors. With this exception, however, that heritage is not to be affected by the prerogative and privilege for Crown debts, under a Writ of Extent or other procedure, further than is permitted by the law of Scotland. This is an important distinction, for in England the Crown's privilege gives it a preference over creditors as regards the debtor's real property, while in Scotland the Crown has no preference over other heritable creditors (Bell, *Com.* i. 782; *Crs. of Burnet v. Murray*, 1754, M. 7873). An Extent originally was used against land only; but by the Statute of King Henry VIII. it was directed to be used in all suits at the instance of the Crown.

An Extent being an execution or warrant to arrest, there must be a debt due to the Crown by a debtor before it can issue. Such a debt may be due either under a simple contract or under bond or recognizance. If under a simple contract, the debt must be recorded, *i.e.* must be found due by a Court of Record. In order that this may be done, a Commission is issued directing the Commissioners to find out what debts are due to the Crown. The Inquisition or return made by the Commissioners, setting forth what debts are due, is recorded, and so satisfies this condition. When a Commission is issued, the Commissioners are directed to take inquisition of the debt by the oath of good and lawful men, and the testimony on oath of other lawful witnesses. No notice of the Commission is given to the defendants; and an Affidavit is, in practice, the sole evidence on which the Commissioners proceed to find out if the defendant is a Crown debtor. Nor is this a difficult question, as every person who has received money on account of the revenue is accounted one. The Affidavit states: (1) The debt. In the

case of a bond, it is the amount set forth in it. (2) That there is danger of its being lost unless immediately recovered. "It is the almost invariable practice to insert in the affidavit some instance of insolvency," but whether such a statement was ever absolutely necessary has never been decided. No preliminary steps, other than obtaining an affidavit, are required in the case of a bond debt. When the Inquisition and Affidavit, or Affidavit, is presented, a Fiat or order that a Writ or Writs of immediate Extent issue against the debtor for the recovery of the debt is obtained from one of the Barons of the Exchequer.

The Fiat is the authority for issuing the Extent, and its date may be, and therefore is, in all cases the date of the writ. The reason of this is in order to take the goods of the debtor as from the date of the fiat. This rule enables any number of Extents to be issued into different counties at the same time. It enables a new writ to be issued if a previous one be set aside on account of any irregularity not affecting the Fiat. It also enables a writ to be issued after the death of the defendant, provided the Fiat be dated before. The writ of Extent itself sets forth the bond or the Inquisition, as the case may be, and directs the Sheriff to seize the body, lands, and goods of the debtor.

The Teste is always, as above stated, the date of the Fiat. No notice is given to the defendant of the issue of the writ. On the return of the writ, however, the debtor may dispute the debt, or a third party may claim the goods which have been seized. If it was a bond debt, the nominal amount is only *prima facie* evidence, as payments to account can be proved. If it was a simple contract debt, the debtor can show that the affidavit was wrong, and prove what the true debt was. The extent can also be set aside on account of (1) patent irregularities, (2) of irregularities not appearing on the face of the proceedings.

If not set aside, it has been decided (1) that the Crown has right to the debtor's goods which were his at the date of the Teste of the writ, no matter in whose possession they may be. The traverser of the Crown's right must make out his right to them as proprietor, or as having a lien over them: (2) money and all debts may be seized, but (3) *bonâ fide* cash payments made by the debtor cannot be recovered; (4) a Crown debtor cannot assign a debt after the Teste, but a *bonâ fide* payment to him cannot be challenged: (5) bills can be seized, but, in order to give the Crown immediate Extent over them, they must be due: (6) whatever may be the rule in England, the Crown has in Scotland, in the case of future and contingent debts at least, the same rights of arrestment as other creditors. The Sheriff has no power to sell the goods seized, but, if no one appears on the return of the writ, a *venditioni exponas* issues to sell the goods, or the Sheriff is ordered to pay the money into the receipt of the Exchequer, or an order is made for sale of the lands. Though goods to a much greater value than the amount of the debt be seized, of course no more should be sold than what is required to pay it. There may be a trial to decide the questions at issue between the Crown and its debtor.

*Extents in Chief in the Second, Third, and Fourth Degrees.*—A similar writ may issue against the debtor's debtor, in which case it is called a writ of Extent in chief in the second degree. This is used when debts due to the Crown debtor are seized. Its object is to make that debtor pay the Crown's debt. The procedure is: on the return of the writ of extent, an affidavit of insolvency and immediate danger is sworn. On that affidavit a Baron's Fiat, is issued, and on it an Extent in chief in the second degree is issued. This process may be repeated to a third and a fourth degree.

*Extent in Aid.*—"Any Crown debtor against whom an Extent in chief

may issue is entitled to have an Extent in aid." The theory of this writ is that there may be insolvency towards the Crown unless the Crown debtor's debts are paid. The writ is issued nominally at the instance of the Crown, but really at the instance of the Crown's debtor. The procedure is: an affidavit is sworn setting forth (1) the Crown debt; (2) the debt due to the Crown's debtor; (3) the risk of insolvency of the Crown debtor's debtor; and (4) the statement that unless the writ is issued the Crown's debt is in danger of being lost.

On this affidavit a *pro forma* Extent in chief is issued against the Crown debtor; and this Extent, with an Inquisition thereupon, and the Affidavit, is the warrant for a Baron's Fiat. On it the Extent in aid is issued. This process may be repeated to the third degree. It was formerly much abused, but is now obsolete. In fact the writ of Extent is impliedly abolished, and a new mode, to be immediately mentioned, of recovering debts due to the Crown is substituted for it by the Court of Exchequer Act, 1856.

*Writ of Diem clausit extremum*.—If the debtor to the Crown die without proceedings having been taken against him in his lifetime, a writ styled *Diem clausit extremum* could be issued, directing the Sheriff to find out what goods and chattels, etc., the debtor had died possessed of. Its purport and effect were the same as those of a writ of Extent. The writ could issue either for a bond debt or a simple contract debt, if found due by Inquisition. It could also issue against a Crown debtor's debtor if the debt from the deceased had been found by Inquisition in his lifetime. Similarly, it could issue against that debtor's debtor if the debt due by the latter had been found by Inquisition in his lifetime.

This writ also is superseded by the Court of Exchequer Act, 1856.

The changes introduced by the Court of Exchequer Act, so far as is necessary to explain the procedure in lieu of Writs of Extent, can be briefly stated. The Court of Exchequer was abolished as a separate Court, and its powers were vested in the Court of Session, which thereupon became the Court of Exchequer in Scotland (s. 1). The jurisdiction, however, possessed by the Sheriff and Justice of the Peace Courts at the date of the Act was reserved to them (s. 41). Any Crown case can (a) commence by the issuing of a subpoena against the defender. A form of this Writ is given in the schedules attached to the Act. It is called in Court like an ordinary Summons. After calling, the information or charge is lodged in process, and the case proceeds like an ordinary action, except that protestation cannot be taken out, nor does a record require to be made up (ss. 5–9). Or (b) the Crown can commence a case in the ordinary manner, by Summons served and called, etc. (s. 10). In cases requiring despatch, any officer of the Revenue may make an Affidavit of danger, which shall set forth "that a debt or duty is due to the Crown by a Crown debtor believed to be insolvent or to have died insolvent"—the affidavit stating any reasonable ground for such belief, and that there is danger of loss to the Crown if such debt or duty be not immediately recovered. When such an affidavit is made, the Lord Advocate, on behalf of Her Majesty, may present a summary petition to the Lord Ordinary in Exchequer causes, setting forth that the debt or duty is resting-owing, and that an affidavit of danger, which must be produced, has been made. "And the Lord Ordinary may thereupon, without further evidence or inquiry, issue *ex parte* a Summary Act and Decree decerning and ordaining such Crown debtor to make payment of such debt or duty": "provided always that any charge given or threatened on such decree, or any diligence following thereon, may be brought under Suspension" (s. 16).



All decrees by the Lord Ordinary in Exchequer causes may be reclaimed against (s. 20), and any decree of the Inner House may be extracted without abiding the expiry of the days of the Minute Book. The extractor is to give priority to such decrees; and they, and also decrees proceeding upon Bonds or other obligations to Her Majesty on which execution may proceed, shall be as nearly as possible in ordinary form, except that in such cases the extractor is to insert in the Extract a warrant to "Sheriffs" to charge and execute diligence according to a form given in a schedule (s. 28). These decrees are to be put in execution by Sheriffs on the demand of any public officer (s. 29). The Sheriffs have power to arrest on such decrees, and the arrestment transfers to the Crown the arrested fund, so far as necessary to pay the Crown debt, with interest and expenses (s. 30). They may also charge the Crown debtor (s. 31), and on the expiry of the days of charge they may poind the Crown debtor's whole moveable effects without exception. The poinding is to be carried through in ordinary form, except that the goods may be removed from the possession of the debtor; and when offered for sale, if no offerer appears, the Sheriff is to retain, at the appraised value, such part as is required to satisfy the Crown debt (s. 32). Thereafter the Extract and Execution of charge may be recorded, and a warrant to imprison be obtained, on which the debtor may still be imprisoned for the period permitted by the Debtors (Scotland) Act, 1880, namely, twelve months (ss. 33, 34). The Crown has also the right of seizing the Books of the Crown debtor under the extract decree (s. 35); and all Bonds or Obligations granted to Her Majesty, albeit not containing any clause of Registration, shall be capable of Registration for the purpose of execution (s. 38). When the Bond does not state any specific sum as due to the Crown, a certificate under the hand of an officer of the Revenue, setting forth the sum due, shall be sufficient evidence of what is due, and the extractor shall make the warrant of charge applicable to that sum (s. 39). In the case of a deceased debtor, the Crown may attach his effects by arrestment and poinding, and that without taking any proceedings against the executor of such debtor. It can do this whether it proceed under a decree for the sum sued for, or under a Bond granted by the deceased person to Her Majesty. Furthermore, on an affidavit that the debtor is dead, the Sheriff who is putting the decree or extract in execution may arrest in the hands of any person indebted to such debtor, and also poind the deceased person's whole moveable effects in the same manner as if the deceased person had been in life (s. 36). Finally, it is declared that the execution of any charge at the instance of the Crown, and in the case of a deceased Crown debtor, the execution of an arrestment or poinding for behoof of the Crown shall be equivalent to the Teste of a writ of Extent. This section also saves the preference of the Crown in competition with other creditors (s. 42).

[West on *Extents*: Bell, ii. *Com.* 40-45. See EXCHEQUER, COURT OF.]

### **Extinction of Obligations.**—See OBLIGATIONS.

**Extortion** is the forcing by violence of a person's will into an expression of consent to undertake an obligation or to forego a benefit. Obligations so induced are voidable at the instance of the injured party. Extortion lies at the root of the issue of "force and fear," or "duress" as it is called in English law. "Although, translating the language of the Roman law, we couple together force and fear as one ground of reduction,



the act of force is truly, as Lord Stair observes (1. 9. 8), only one means of inducing fear, the true ground of reduction being *extortion* through the influence of fear induced in various ways, such as fear of torture, infamy, danger to life" (L. Deas in *Priestnell*, 1857, 19 D. 495). "Force and fear annul engagement, when not vain or foolish fear, but such as to overcome a mind of ordinary firmness" (Bell, *Prin.* s. 12). But the question is really one for the jury—whether in the circumstances the engagement was *de facto* extorted by coercion (Bell, *Com.* i. 314; *Lore*, 1870, 9 M. 291). In the words of Lord Benholme in *Priestnell's* case (*supra*), "the authorities in our law upon this subject are happily very few. The doctrine is very generally expressed in our text-writers" (Stair, i. 9. 8; Ersk. iii. 1. 16; iv. 1. 26; Bell, *Prin.* s. 12; Bell, *Com.* i. 314. See Pollock on *Contracts*, ch. xii.; Addison, 8th ed., 118; Chitty, 13th ed., 198–201; Anson, 8th ed., 177, 178).

A choice illustration of violence is reported against the *Earl of Orkney* (1606, Mor. 16481). He summoned Vinfra into his presence, and "with terrible countenance and words, and laying his hand upon his whinger, he threatened with execrable oaths to bereave Vinfra of his life, and stick him presently through the head with his whinger if he signed not" an obligation in the Earl's favour. Vinfra signed, but afterwards refused payment. "The Lords found the exception of fear very relevant, and sufficiently qualified." Compare with this the case of *Gelot v. Stewart* (1870, 8 M. 649; 1871, 9 M. 1057), where Dr. Stewart signed a bill in favour of Madam Lynch while shut up in a fortress in Paraguay, and in terror of his life from the violence of General Lopez. In this case the rights of third parties to a bill so extorted were considered, but no decision was pronounced.

It is not extortion to threaten a person with just imprisonment for the enforcement of an obligation, unless, perhaps, "this instrument of terror is applied to extort from a debtor something more than the debt for which imprisonment is competent" (Bell, *Com.* i. 315; *Fraser*, 13 Dec. 1810, F. C.; Bell, *III.* i. 8). To threaten A. with the justifiable imprisonment of B. would not ground an action of reduction at A.'s instance (*Rutherford*, 1698, M. 16502). As where a wife signed deeds at her husband's request, on being informed by him that he was in danger of imprisonment and would flee the country if she declined, she was held not entitled to reduce (*Priestnell*, 1857, 19 D. 495). So a wife signing under the influence of threats that, unless she did, her husband would be imprisoned for a civil debt, held bound (*Craig*, 1865, 4 M. 192). But where two sons granted a bond for the ransom of their father, who had been carried off to a private prison, they were held entitled to the exception of extortion (*M'Intosh*, 1671, M. 16485). In *M'Intosh's* case (1883, 11 R. 8), Chalmers wrongfully imprisoned M'Intosh on the expiry of a charge upon an extract registered protest of a bill. This he did with the ulterior end in view of driving M'Intosh out of a firm of which he was a partner. While M'Intosh lay in prison he signed (1) an assignation of his share of the said business, (2) a letter of indemnity to Chalmers, by which he undertook not to sue Chalmers for damages for wrongful imprisonment. Held that the letter of indemnity did not bar the pursuer's right to claim damages. Lord Young said: "I am of opinion that a transaction between the victim and author of unlawful imprisonment cannot be upheld. There is a fundamental difference between persons under legal restraint and persons under illegal restraint, and no transaction between the author and victim of illegal restraint can receive effect."

Another aspect of extortion is suggested by Stair, that contracts wherein one of the parties has taken advantage of the necessity of the other should

not be enforced (Stair, i. 10. 15). This doctrine has lain dormant for many years, but it is thought that it furnishes the only sound ground of judgment in those cases where the Courts have refused performance of certain money-lending transactions. In *Gordon* (3 S. L. T. 387, 33 S. L. R. 311) the facts were these. Miss Young was in straitened circumstances, and applied to Gordon for a loan of £100. She signed promissory notes for this sum plus interest, and the notes became due on 3 July 1895. Being unable to pay, Miss Young approached Gordon, and he granted her twenty-four hours' delay in consideration of receiving bills for £250 payable on demand. Gordon protested these bills, and registered the protest on 23 July. Miss Young brought a suspension of a threatened charge, and consigned £100. The Court held that Miss Young was not liable on the bills for £250, and suspended. The learned judges of the Second Division were unanimously of opinion that there was no binding agreement. They joined in abuse of the transaction. The Lord Justice-Clerk said it was unconscionable and disgraceful; Lord Young thought there was an absence of consideration: Lord Trayner said: "It is an iniquitous transaction, and an attempt to defraud a poor woman." Beyond these remarks, their Lordships are not reported to have given any legal grounds for their decision, which at first sight appears to run counter to the accepted theory of freedom of contract. Even in countries where the doctrine of consideration is fully developed, the Courts refuse to inquire into adequacy of consideration, and in Scotland no consideration is necessary to support a promise. Neither was Miss Young ignorant of the amount for which she signed, nor of the nature of the transaction, and it can hardly be said that she was the victim of fraud in the usual acceptance of that term in contract law.

It is thought that this contract illustrates Stair's theory of extortion, where he says that the natural obligation of charity constraineth men to sell at a just price, and not to take advantage of the necessity of others.

### Extract (Extract Decree).

1. Definition of Extract, and Statutory Provisions relating to it.
2. Form of Extract.
3. The word "Decern" necessary for Extract.
4. Rules and Practice in Extractor's Office.
5. When Extract may be issued.
6. Interim Extract.
7. Power to supersede Extract.
8. Expenses of Extract.
9. Extracted and Unextracted Processes.
10. Value of Extracts as Evidence.
11. Errors in Extracts.
12. Extracts of certain Interlocutors unnecessary.
13. Extracts of Verdicts.
14. Extracts of Protestation.
15. Extracts in Court of Exchequer.
16. Extracts in Bill Chamber.
17. Extracts in Court of Justiciary.
18. Extracts in Teind Court.
19. Extracts in Sheriff Court.
20. Extracts in Church Courts.

1. *Definition of Extract, and Statutory Provisions relating to it.*—A litigant who has been successful in a cause is entitled to have an official copy of the

judgment in his favour, in order that he may enforce it and execute diligence against the unsuccessful party. Extract has been defined as "a certificate by the proper officer that a decree in the terms stated exists in the records of the Court" (*Inglis*, 1862, 24 D. 541, per L. J. C. Inglis).

In the Court of Session extracts are issued and signed by the extractor, an officer of Court. The extract must be signed on every page by the extractor, and an extract signed by the judge pronouncing the decree has been held bad (*Balfour, Practicks*, p. 389; *Macdougall*, 1623, Mor. 12180). No interlocutor can be extracted unless it is signed by the judge who pronounced it (Act 1686, c. 3). The Court of Session Act of 1838, 1 & 2 Vict. c. 118, provided that, instead of extracts being issued by the Clerks of Court, one principal extractor should be appointed to give out extracts, and that he should have one assistant, who, in the absence of the extractor, might subscribe and authenticate extracts. Extracts used to be very lengthy documents, full of repetitions. In 1810 a Commission, which was appointed to consider the administration of justice in Scotland by Act 49 Geo. III. c. 119, reported *inter alia* that the form of extracts then in use consisted of making out a written copy of all the pleadings, manuscript and printed, in the process, with all the interlocutors and judgments of the Court following thereon; that a complete duplicate was made for preservation, and that extracts were drawn by an extractor and certified by one of the principal Clerks of Session (see Report of Commissioners, 2 Feb. 1810). Following the recommendations of the Commissioners, an Act was passed in 1810 to provide an abridged form of extract (50 Geo. III. c. 112). In the schedule to that Act short forms of extract were provided, to be used in ordinary petitory actions and in certain special forms of process. The extract contained the date of judgment, the names of parties, a statement of the decree pronounced, and ordained letters of horning and all other execution. The warrant for diligence was a separate document. By the Personal Diligence Act, 1838, 1 & 2 Vict. c. 114, now known as the Debtors (Scotland) Act, 1838, it was provided that all extracts of decrees in Court of Session, Teind Court, and Court of Justiciary should contain warrant to arrest, charge, and poind; and a schedule annexed to the Act gives a form of the warrant to be attached to extracts. It has been held in the House of Lords that this Act is directory, and not peremptory, as to the form of warrant (*Cleland*, 1850, 7 Bell's App. 153).

The Court of Session Act of 1838, 1 & 2 Vict. c. 118, also empowered the Court to make regulations by Act of Sederunt as to the form of extract, and such an Act was passed on 24 Dec. 1838. It provided that it should not be necessary for the extractor to repeat in the warrant the particulars already enumerated and ordained in the body of the extract. A schedule (A) attached to the Act prescribed the form of warrant practically as it is in use at the present time. By the Act of Sederunt of 8 Jan. 1881, it was provided, in consequence of the abolition of imprisonment for civil debts, that the words "and imprisonment" should be omitted from the warrant, except in decrees for taxes or alimentary debts, or decrees *ad factum præstandum*.

2. *Form of Extract*.—The form of extract of a decree *in foro* in an ordinary petitory action, where there have been no complications, such as restricting or sisting new parties, is now as follows:—

At Edinburgh [*date of decree*].—In the summons and action instituted before the Lords of Council and Session at the instance of *A. B.* [*name and designation*], pursuer, against *C. D.* [*name and designation*] defender: After sundry procedure, in the course of



which defences were lodged and the record was closed : Sitting in judgment the said Lords, having considered the cause, Decerned and Ordained, and hereby Decern and Ordain, the said *C. D.* to make payment to the said *A. B.* of the sum of £ , with interest [as in conclusions of summons], together with the amount of £ , being the taxed amount of the expenses of process, and the sum of £ , being the dues of extract : And the said Lords grant warrant to messengers-at-arms, in Her Majesty's name and authority, to charge the said *C. D.* personally, or at his dwelling-place, if within Scotland, and if furth thereof by delivering a copy of charge at the office of the Keeper of the Record of Edictal Citations at Edinburgh, to make payment of the foresaid sum or sums of money, principal, interest, expenses, and dues of extract, all in terms and to the effect contained in the decree and extract above written, and here referred to and held as repeated *breveitatis causa*, And that to the said *A. B.*, if the said *C. D.* be within Scotland, within fifteen days, if in Orkney or Shetland, within forty days, and if furth of Scotland, within fourteen days next after he is charged to that effect, under the pain of poiding ; And also grant warrant to arrest the said *C. D.*'s readiest goods, gear, debts, and sums of money, in payment and satisfaction of the said sum or sums, principal, interest, expenses, and dues of extract : And if the said *C. D.* fail to obey the said charge, then to poid his readiest goods, gear, and other effects ; and, if needful for effecting the said poiding, grant warrant to open all shut and lockfast places, in form as effeirs. Extracted upon ( ) pages by me [extractor's name], extractor in the Court of Session, at Edinburgh, this day of one thousand eight hundred and years.

[Extractor's Signature.]

3. *The Word "Decern" necessary for Extract.*—No interlocutor finding sums due by one party to another, or appointing certain things to be done by one of the parties, can be extracted or enforced by diligence unless the word "decern" be contained in the interlocutor. If it is a process of adjudication, the word "adjudge" is indispensable (Beveridge, *Form of Process*, p. 628 ; *Anderson*, 1836, 14 S. 863). But it is sufficient if the word decern occurs once in the interlocutor, as it applies to all the findings in favour of either party (*Greig*, 1830, 8 S. 908). In one case an application was made to have the word decern added to an interlocutor two years after the interlocutor had been pronounced. The Court added the word in order to enable the decree to be extracted (*Lawrie*, 1833, 11 S. 246). The Act of Sederunt of 11 July 1828 states that "acts" or interlocutors which do not contain any decerniture may be extracted. Acts are not now very common, but are used in actions of choosing curators and some other forms of process. It is now the practice to put the word decern into all interlocutors which decide any question. An extract of an act does not contain a warrant for execution of diligence.

As to the word "decern" in Sheriff Court extracts, see below.

4. *Rules and Practice in Extractor's Office.*—An extract may be either printed or in writing, or partly both, and ought to specify the number of pages of which it consists. It ought to mention at the end any deletions or marginal additions (*Dickson*, 1290) ; or if they are not so mentioned, they should be initialed by the extractor. The extractor must sign every sheet (*Fraser*, 1839, 2 Swin. 436). If a judgment has been pronounced some days before the interlocutor is signed, the extract should bear the date of signature. The extract should bear the dates of the interlocutor decerning for expenses as well as of the interlocutor disposing of the cause : but this is not absolutely necessary (*Thomson*, 1841, 3 D. 1167). It is the practice in the extractor's office to mention in the extract the date of the decree for expenses, unless intimation is made to the extractor that the expenses have already been paid. If the Inner House has adhered *simpliciter* to the Lord Ordinary's judgment, its date is given. If the interlocutor is varied or additional expenses are awarded in the Inner House, both dates are given. The same rule applies to cases which have been appealed to the House of Lords. In



all cases, even where the decree is pronounced by a Lord Ordinary, the extract bears to be of a decree by the Lords of Council and Session. The Lord Ordinary is held to represent the Court (*Thomson*, 1841, 3 D. 1167).

The date on which the extract was completed must also be specified in the extract; but it is sufficient if the date is written below the extractor's signature, and not in the body of the deed (*Cleland*, 1850, 7 Bell's App. 153, 11 D. 602).

The regulations in force in the extractor's office are given in detail in the *Parliament House Book*. When a process is transmitted for extract there must be sent (1) the record, (2) the interlocutor sheet, (3) any other necessary steps of process. If the principal copy of the summons has been lost, extract cannot issue except of consent (*Mair*, 1862, 24 D. 312); but by the Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 15, when a summons or other original writ has been lost, a copy thereof, proved and authenticated to the satisfaction of the Court, may be substituted for, and held equivalent to, the original (*Couper*, 1869, 7 M. 1130). As to a lost interlocutor sheet, see *Cofton*, 1875, 2 R. 599, and *Douglas*, 1882, 20 S. L. R. 579. A memorandum is sent with the process stating (1) the nature of the cause, the leading names of the parties, the name of the Lord Ordinary or Clerk from whose office the process is transmitted; (2) the date of the interlocutor or interlocutors of which extract is wanted; (3) whether the interlocutor is interim or exhausts the whole cause; (4) any peculiarity, such as change of party, sisting of new parties, qualification or restriction of claim. A copy of the interlocutor of which extract is desired must be sent, but not the opinion of the judge or judges. No extract will be issued until stamp duty has been paid. Productions in causes which are transmitted for final extract should be taken up before transmission, as after extract no productions are given up by the extractor except upon a warrant from the Court. In actions of constitution against unentered heirs, the extractor refuses to issue extract of decrees pronounced unless the defender has been duly charged by citation and execution to enter heir. A minute by the defenders, holding the summons as served, renders the decree not extractable (10 & 11 Vict. c. 48, s. 16).

A person is entitled to as many extracts of a decree in his favour as he may wish, but he can only get one at the expense of his opponent (*Inglis*, 1862, 24 D. 541). There is no reason why an unsuccessful party should not get an extract of a decree against him if he desires it, and applications for extract under these circumstances are sometimes made. The extractor does not issue decree to an unsuccessful party till extract has been given out to the party in whose favour the decree is pronounced. A person who tenders payment of the sum decreed for in the decree, and the dues of extract, in order to stop diligence, is not entitled to demand that the extract should be delivered up to him. If he does so, his tender of payment is not unconditional, and diligence may proceed (*Inglis*, *ut sup.*).

Part of an interlocutor may be extracted. This is done under authority of "Articles of Regulation, 2 Nov. 1695," which allows decrees against more debtors than one, and decrees of preference, to be extracted in part. Accordingly, in multiplepointings and actions of division and sale, the extractor will issue a part extract without authority from the Court. On the other hand, in petitions for authority to complete title the extractor is often asked to give out separate extracts relating to lands lying in different counties, but all dealt with in the one interlocutor. This the extractor declines to do unless with the authority of the Court.

5. *When Extract may be issued.*—All acts or decrees of the Court of

Session are extractable in twenty-four hours after the reading of the minute-book, that is, eight free days from the date of the interlocutor (Act 1671, c. 16, s. 29; Acts of Sederunt, 20 January 1671, 5 June 1725, 21 December 1822). Acts, which are interlocutors which do not contain any decerniture, may be extracted immediately if pronounced in the Inner House, but if they are pronounced in the Outer House extract cannot be given out till after the reading in the minute-book, unless the Lord Ordinary has dispensed with it and allowed immediate extract. The Lord Ordinary could not dispense with reading in the minute-book in case of a decree (Beveridge, *Forms of Process*, 628), but in practice it is frequently done. Decrees in absence cannot be extracted till ten days after the interlocutor has been pronounced (31 & 32 Vict. c. 100, s. 23). When the process has been transmitted for extract, extract will be prepared and issued unless it is interdicted by a Lord Ordinary or the Court, or unless the Clerk to the process intimates to the extractor that a reclaiming note has been presented (Act of Sederunt, 21 December 1822). Where an interlocutor has been appealed against to the House of Lords, the person holding the judgment of the Court of Session may present a petition for execution pending appeal, and the Division may, in its discretion, allow extract and execution to proceed under the interlocutor which is under appeal.

An extract of a decree may be taken out any number of years after the decree has been pronounced; and to enable this to be done, it is not necessary that the action should be awakened (Watson, *Forms of Process*, 315). In an action against two defenders, the Lord Ordinary assoilzied one defender and found him entitled to expenses, and granted decree for a certain sum against the other. The pursuers reclaimed against this interlocutor, but intimated that they did not object to it in so far as it assoilzied the one defender. He accordingly got his account of expenses taxed and decerned for; but the extractor refused to extract the interlocutor decerning for the expenses, on the ground that the process was in the Inner House. The Court granted authority to the extractor to issue extract (*Ayr Road Trustees*, 1883, 10 R. 1295).

6. *Interim Extract*.—Extracts are either final or interim. Interim extract could formerly be issued only by special allowance of the judge or Court, but it was provided by 13 & 14 Vict. c. 36, s. 28, that all acts, warrants, and decrees granted during the dependence of a process, “and which, according to the present practice, might be extracted *ad interim*, if special allowance to that effect were granted,” should be extractable *ad interim* without the necessity of such special allowance, unless the Lord Ordinary or the Court should otherwise direct. The wording of this section left it in doubt whether a decree, exhausting the merits of the case, could be extracted *ad interim* without special allowance. If interim extract of such a decree is desired, it is safer to get special leave from the Court; although in one case where interim extract of a decree exhausting the merits had been given out, the Court granted a subsequent decree for expenses, which would not have been competent if, as was argued, the extract was really a final one, and the process was therefore out of Court (*Beveridge*, 1852, 14 D. 772; see also *Taylor*, 1860, 22 D. 1031).

In petitions for appointment of a judicial factor or *curator bonis*, and subsequent notes and petitions in the factory, all extracts are interim, including extract of a decree discharging the representatives of a deceased factor. The only final extract in such a process is the extract of the decree discharging the factor when his ward has died, or when the factory is brought to an end.

7. *Power to supersede Extract.*—The Court has power to supersede extract till some condition or qualification of the decree shall have been implemented. For instance, a decree may bear that it is not to be extracted till caution has been found, or till a sum has been consigned, or till something has been done. Extract is often superseded till executors have obtained confirmation. A motion to supersede extract is sometimes made in order that the party against whom decree has been pronounced may gain time in which to make good a counter-claim to compensate the sum found due by him in the decree. Such a motion will not be readily granted (see Ersk. iii. 4. 16; *Lawson*, 1844, 7 D. 153; *Thomson*, 1855, 17 D. 1081). Where extract has been superseded, it is the duty of the Clerk to the process not to transmit for extract till the conditions have been implemented.

8. *Expenses of Extract.*—The successful litigant is entitled to extract at the expense of his opponent (*Hunter*, 1857, 20 D. 60). And the expense of extract is decreed for in the extract. The expenses of extract must be tendered if the expense of approving of the Auditor's report is to be saved (*Scott*, 1860, 22 D. 923). In the case of a decree in absence it is incompetent to extract a decree for the random sum of expenses concluded for in the summons. An account is lodged, and decree is extracted for the amount as taxed by the Auditor (Court of Session Act, 1821, 1 & 2 Geo. IV. c. 38, s. 33).

If, after a process has been transmitted for extract, a reclaiming note is presented and intimation of it is made to the extractor, the extractor retransmits the process whenever "he has been paid the expense which shall have been actually incurred. . . . Provided always that such payment shall be without prejudice to any question by whom the burden thereof shall be ultimately borne" (Act of Sederunt, 21 December 1822). By the Act of Sederunt 18 December 1896, the fees due on extracts are as follows: (1) Extract of decree in absence, 15s. or £1, according to circumstances. (2) Extract of decree *in foro*, £1. These fees are payable on each extract issued. (3) Extract of admission as a law agent, 10s. 6d. (4) Extract of protestation, 10s. 6d. (5) Certificate under Judgments Extension Act, 5s. To these fees is added a charge of 1s. 6d. per sheet for engrossment of extract and record copy.

9. *Extracted and Unextracted Processes.*—When a process has been sent to the extractor's office for interim extract, it is retransmitted to the Clerk to the process whenever the interim extract has been issued. After the extractor has issued final extract in any cause, the process is out of Court, and the extractor transmits it to the General Record Office under the charge of the Lord Clerk-Register. Processes are kept in the extractor's office for about a year after an extract is issued, and two or three times annually the processes which have accumulated in the extractor's office are transmitted. A copy of every extract issued is engrossed in the books of the extractor. The Court of Session Act of 1821, 1 & 2 Geo. IV. c. 38, s. 18, empowered the Court to make an Act of Sederunt dealing with unextracted processes; and, accordingly, an Act was passed on 22 January 1876, which provided that all unextracted processes should be transferred to the custody of the Lord Clerk-Register; that a process should be transmissible one year after date of last interlocutor or calling; that it should be the duty of the Clerks of Court to transmit; that the transmitted processes should be arranged and indexed; that persons having interest should be entitled to access to, and exhibition of, unextracted processes; that processes might be retransmitted to the Clerks of Court if required; that no process or part of



process might be borrowed from the Lord Clerk-Register's Office; that he and his deputies should issue certified copies of interlocutors or steps of process; that any person having in his hands a step in a process which had been transmitted to the Lord Clerk-Register might return the said step, and that it should be put up with the process.

10. *Value of Extracts as Evidence.*—An extract *ex facie* regular proves itself, the extract being by law presumed to be conform to the interlocutors and other warrants of it (Ersk. iv. 2. 6), and to be signed as required by law (Stair, iv. 42. 10). An extract may be challenged on specific grounds, such as that it is not conform to the decree on which it proceeds, or that it is dated wrong or has been prematurely issued, but there is a presumption against this. (For cases on this subject, see COPIES AND EXTRACTS.)

11. *Errors in Extract.*—If there is an error in an extract the Court may recal it (*Minister of Borrowstounness*, 1764, 5 Bro. Supp. 425), or order it to be corrected, and this has been done two years after the extract had been issued (*Brown*, 1840, 2 D. 1467). It has been held that it is beyond the power of a judge of an inferior Court to correct an extracted decree which has been pronounced by him (*Edington*, 1829, 8 S. 192); but a Lord Ordinary was found entitled, on a note being presented to him, to order a clerical error in an extract, as to the designation of one of the parties, to be corrected (*Miller*, 1850, 12 D. 964; see also *Clark & Macdonald*, 1895, 23 R. 102). If there is a mistake in an extract, a new one can always be issued.

12. *Extracts of certain Interlocutors unnecessary.*—By the Court of Session Act, 1850, 13 & 14 Vict. c. 36, s. 25, it was provided that it is unnecessary to get an extract of an interlocutor granting a commission or diligence, and that a copy of the interlocutor, certified by the Clerk or his assistant, shall have the same force and effect as a formal extract. A certified copy of an interlocutor fixing a trial is sufficient warrant for citing witnesses and havers (s. 43).

By the Bankruptcy Act 1856, 19 & 20 Vict. c. 79, s. 174, deliverances under the Act, purporting to be signed by the Lord Ordinary or other judge or Sheriff, or copy purporting to be signed or certified by any Clerk of Court, shall be judicially noticed by all Courts and judges in Her Majesty's dominions, and shall be received as *prima facie* evidence without the necessity of proving their authenticity or correctness, or the signatures appended, or the official character of the person signing, and shall be sufficient warrants for all diligence and execution by law competent. So also a certified copy of the act and warrant in favour of the trustee is sufficient *prima facie* evidence to give him a title to sue (s. 73).

By the Court of Exchequer Act, 1856 (19 & 20 Vict. c. 56, s. 27), certified copies of interlocutors in Exchequer causes are equivalent to extracts, except in order to diligence.

13. *Extracts of Verdicts of Jury.*—Since the abolition of the Jury Court the verdict of a jury which is applied by the Court of Session is extracted in the same way as any other decree.

14. *Extracts of Protestation.*—When there has been a protestation for delay in calling a summons, the note of protestation may be extracted on the expiry of nine free days from its date, the time for reading in the minute-book having expired (Beveridge, *Forms of Process*, i. 272; see *Lee*, 1897, 4 S. L. T. 445). No warrant for extract of a protestation can be obtained except on a sederunt day. Thus, if the nine free days expire on a Sunday or Monday, the warrant for extract cannot be obtained till the Tuesday. The extract decerns for £3, 3s. of expenses (13 & 14 Vict. c. 36, s. 23). See PROTESTATION.

15. *Extracts in Court of Exchequer.*—By the Court of Exchequer



(Scotland) Act, 1856, 19 & 20 Vict. c. 56, s. 28, it was provided that all decrees pronounced by the Divisions of the Court of Session, sitting as Court of Exchequer, should be extracted by the extractor of the Court of Session, without abiding the expiration of the days of the minute-book. Extracts in Exchequer causes take precedence of other business in the extractor's office. The extract is in ordinary form, but Schedule S attached to the Act gives a special form of warrant, to be subjoined to extracts of Exchequer decrees in favour of the Crown. Such extract is sufficient warrant to any messenger-at-arms or sheriff-officer to execute charge, arrestment, and pouding in terms thereof.

16. *Extracts in Bill Chamber.*—Extracts in the Bill Chamber are issued not by the extractor, but by the Bill Chamber Clerk. This applies only to proper Bill Chamber work. In petitions as to factories, etc., which, under the Clerks of Session Regulation Act, 1889, 52 & 53 Vict. c. 54, go before the Junior Lord Ordinary and appear in his Bill Chamber Roll, the extracts are given out by the extractor; but decrees in suspensions and interdicts, before they go to the Court of Session, and in certain sequestration processes, are extracted by the Clerk to the Bills.

17. *Extracts in Court of Justiciary.*—Extracts in the High Court of Justiciary are, by immemorial practice, issued by the Clerk of Court. They are similar in their form to extracts in the Court of Session. The dues of extract are decerned for in the interlocutor of the Court. Extracts are issued immediately after decree, on application being made to the Clerk. In criminal cases, extracts of the sentences pronounced are given out by the Clerks of Court immediately after sentence. The extract is the warrant to the prison authorities to remove the prisoner to the prison and to detain him there, or otherwise to carry out or enforce the orders of the Court.

18. *Extracts in Teind Court.*—Extracts of decrees in the Teind Court are issued by the Clerk of Teinds. The Act 50 Geo. III. c. 112, which introduced short extracts in the Court of Session, was applied to extracts in the Teind Court, except in processes of valuation of teinds, by 1 & 2 Vict. c. 118, and the form of extracts is regulated by these Acts, and by 1 & 2 Vict. c. 114, and by Act of Sederunt 4 Mar. 1840. The schedule to the last-mentioned Act supplies the form now in use of extracts of decreets of modification and locality and the warrant to charge. The words "and imprisonment" are now omitted from the warrant, but no Act of Sederunt applicable to the Teind Court has been passed to authorise this change. By the Act of Sederunt 10 June 1707 (which is not printed), it was provided that no decree could be extracted till the "Lords shall have mett another dyet after pronouncing thereof." This was changed by Act of Sederunt 7 Feb. 1821, which provided that if an interlocutor became final in vacation, and no reclaiming note was lodged on the box-day, extract might be given out. Fourteen days is the time after which extracts are now issued in ordinary teind cases, but eight days in processes of locality. The Act of Queen Anne, 1707, c. 9, provided that new extracts should be given out to persons presenting to the Teind Court any authentic extract from the former records of the Court, many of which had been lost. The old extract was recorded and preserved by the Lord Clerk-Register, and the new one was given out gratis. The extract is given on petition to the Teind Court (*Jurid. Styles*, vol. iii. 879).

19. *Extracts in Sheriff Court.*—The form of extracts in the Sheriff Court was regulated by the Act of Sederunt 27 January 1830, the schedule to which contained abridged forms, and by the Debtors (Scotland) Act, 1838, 1 & 2 Vict. c. 114, s. 9, which enacted that the extract should contain a warrant to charge.

The form of warrant was modified by Act of Sederunt 8 January 1881, which was passed after imprisonment for civil debt was abolished. The old forms prescribed in 1830 were used till 1892, when the Sheriff Courts (Scotland) Extracts Act, 1892, 55 & 56 Vict. c. 17, was passed. That Act simplified and abridged the extracts of decrees in the Sheriff Court, and a schedule attached to the Act contained abbreviated forms suitable to various classes of actions. The Act also provided that it was not necessary that the word "decern" should occur in a decree in order to allow it to be extracted. The form of warrant in the extract is: "And the Sheriff grants warrant for all lawful execution hereon by instant arrestment, and also by poinding after a charge of seven free days." The Act states what the import of the short form of warrant for execution is to be held to be in different circumstances (s. 7). The provisions of this Act apply to decrees pronounced prior to its passing, but any person entitled to an extract may demand from the Sheriff Clerk a full extract in the older form. It was also provided that no extract shall be held invalid on account of form, if it be sound in substance (s. 11). This Act does not apply to proceedings in the Sheriff's Small Debt Court, or Debts Recovery Court, or to summary ejections under 1 & 2 Vict. c. 119, ss. 8-13, or to commissary or executry proceedings, or proceedings for service of heirs, or completing titles, or to proceedings under the Summary Jurisdiction (Scotland) Acts, 1864 and 1881. The Court of Session has power to pass Acts of Sederunt to give full effect to the purposes of this Act.

In the Sheriff Court extracts are granted by the Sheriff Clerk. The Act of Sederunt of 10 July 1839 fixed six free days as the time after which a decree in the Sheriff Court could be extracted, and, forty-eight hours after, an interlocutor dealing with expenses, unless intimation in writing had been made to the Clerk that the judgment was to be appealed to the Court of Session. The Sheriff had power to allow immediate extract if he thought fit. By the Court of Session Act, 1868, 31 & 32 Vict. c. 100, s. 68, it was provided that extract of a judgment in an inferior Court could not be extracted till twenty days after the judgment was pronounced. But this applied only to judgments which could be appealed to the Court of Session, and there was no power given to the Sheriff to allow immediate extract. By the Sheriff Court (Scotland) Act, 1876, 39 & 40 Vict. c. 70, the rule was changed, and extract of any Sheriff Court judgment was allowed to be issued after the expiration of fourteen days from its date, but not before that time, unless the Sheriff who pronounced the judgment allowed the extract to be issued sooner (s. 32; see *Tennents*, 1881, 8 R. 824). Where a Sheriff had pronounced an interlocutor and allowed "extract of this decree to go out on caution being found," it was held that that did not entitle the successful party to take extract before the fourteen days had expired (*Simpson*, 1888, 16 R. 131). In regard to decrees in absence, it was provided that the Sheriff might grant decree whenever the *induciae* had expired, and that seven days after decree extract might be issued. If within the seven days a motion for recall of the decree in absence had been made to the Sheriff, the decree could not be extracted till the motion had been disposed of.

The form of extract of a decree in the Small Debt Court is regulated by sec. 13 of the Small Debt Act, 1837, 1 Vict. c. 41, and Schedule A, No. 7. The extract is written or printed on the summons, and contains a warrant for instant execution by arrestment, and for execution by poinding and sale after ten free days if the defender or person against whom judgment is given was present in person when the decree was pronounced, or otherwise after a charge of ten free days. Second extracts may be obtained from

the Clerk of Court on payment of a fee of one shilling (Small Debt Act, 1889, 52 & 53 Vict. c. 26, s. 12). Sched. C gives the form of extract now in use. It may be written either on the principal summons or separately. As to the effect of a second extract, see SMALL DEBTS. In the Debts Recovery Court the provisions as to extract are the same as in the Small Debt Court (Debts Recovery Act, 1867, 30 & 31 Vict. c. 96, ss. 9 and 11).

20. *Extracts in Church Courts*.—In Church Courts extracts are issued by the Clerks of Assembly or Synod or other Court. Extracts so granted are probative, except in the case of Dissenting Churches. Extracts of the proceedings of their Courts are not admitted, as their official character is not recognised (*Mathers*, 1849, 12 D. 433).

On the subject generally, see Ersk. iv. 2. 6; Stair, iv. 1. 45; Bankt. iv. 36. 3; Bell, *Prin.* s. 2271; Mackay, *Manual*, 313–321; Dove Wilson, *Sheriff Court Practice*, 131, 322–331; Shand, *Practice*, 113, 278, 306; Watson, *Forms of Process*, 315; Dickson on *Evidence*, 1285–1298; Coldstream, *Practice*, 251.

**Extract (Extract of Deeds).**—When private deeds have been registered in public records, certified copies of them, authenticated by the proper official, are known as extracts. Certain deeds can be recorded in a public register and then taken away, and an extract of such deeds may be given out by the officer in charge of the register, the extract in these cases being a copy made, not from the principal deed, which has been returned to its owner, but from the transcript which was made in the books of the register when the deed was recorded. Private deeds may be recorded (1) for preservation, (2) for preservation and execution, (3) for publication; and extracts can be obtained from the keepers of the registers. When a deed contains a clause consenting to preservation for execution in the Books of Council and Session, the deed may be registered. An extract of the deed, with a decree of the Court added in terms of the consent to registration, will be given out by the keeper of the books. It has the effect of a decree, of Court, and is a sufficient warrant for diligence. The Writs Execution (Scotland) Act, 1877 (40 & 41 Vict. c. 40), provided that extracts of writs registered in the Books of Council and Session and in Sheriff Court Books should contain a warrant for execution, and specified the diligence competent thereon. A schedule to the Act gave a short form of extract. See REGISTRATION. Extracts may also be obtained from registers of births, marriages, and deaths of entries in them, and such extracts, when issued by the proper officer, are admissible as evidence (17 & 18 Vict. c. 80, s. 58).—[Stair, ii. 3. 24; Bankt. ii. 3. 44; Ersk. iv. 1. 22; Bell, *Prin.* s. 2217; Bell, *Lectures*, 220.] See COPIES AND EXTRACTS.

**Extractor.**—The Extractor is an officer of Court appointed by the Crown. His duty is to issue extracts of decrees and acts of the Court of Session. Extracts were at one time issued by the Clerks of Court (Beveridge, vol. ii. App. 1); and it does not appear when special extractors were first appointed. In 1768 there were nine extractors, who were attached to the offices of the Clerks of Court (Russell, *Forms of Process*, 11). The extractors were members of the College of Justice (Act of Sederunt, 23 Feb. 1687). The extracts drawn by them were certified by the Clerks. The office of extractor was abolished in 1810 by 50 Geo. iii. c. 112, s. 13, and re-established in 1838.



Immediately prior to the Act of 1810 there were eighteen extractors attached to the Court of Session. Agents were entitled to employ any one of those whom they chose. There was no salary attached to the office except in the case of the King's Extractor, whose duty was to extract decrees in Exchequer Court in favour of the Crown, and who received a salary of £10, 10s. in addition to fees. All the other extractors were paid entirely by the fees which they earned for work done. Some of the extractors were also assistant Clerks of Court. The extracts which they prepared were very lengthy and expensive, and the whole sum annually paid by litigants for extracts was very large. When the offices of extractors were abolished, compensation was paid to the then extractors in annuities varying from £500 in one case to £20 in another. The Act of 50 Geo. III. abolished the separate office of extractor, and provided that extracts should be issued by the assistant Clerks of Session, who were to have fixed salaries and copying fees.

By the Act of 1821, 1 & 2 Geo. IV. c. 38, ss. 18, 19, and 20, it was provided that the principal Clerks of Session might appoint four extractors and eight engrossing clerks. These extractors held office at the pleasure of the principal Clerks, and received the ordinary charge for copying, as well as a salary of £250 each.

By the Act of 1838, 1 & 2 Vict. c. 118, s. 18, the system was again changed, and one principal extractor was appointed. He is not entitled to practise before the Court of Session, or hold any other official situation in the Court. He performs his duties with the aid of an assistant extractor nominated by him, and holding appointment at pleasure under him, and for whom he is responsible. The assistant extractor is empowered, in the absence from necessary cause of the principal extractor, to subscribe and authenticate extracts. It is also provided in the Act that the junior principal Clerk of Session shall superintend and direct the preparation of extracts, "by giving such directions or instructions from time to time as he may think fit, or be by the Court directed to give, which directions or instructions the extractor is hereby required to comply with; provided always that, in order to give due efficiency to the foregoing provisions, the junior Clerk of Session, from time to time, as he may think proper, and at any rate shall, fourteen days before the termination of each winter and summer session of the Court, report to the Court how far the duties of the principal extractor and his assistants and clerks are properly discharged." Sec. 20 of the same Act transferred to the extractor from the Keeper of the Records the duty of keeping and arranging concluded processes till such time as they are transmitted to the Record Office in the Register House. The extractor has a salary of £500, and is not bound to devote his whole time to the duties of his office. The salary of the assistant extractor is £400. As to the duties of the extractor and the practice and regulations in his office, see EXTRACT.

**Extractor of Court of Teinds.**—An office, special appointment from the Crown, to extract the acts and decrees of this Court. The Teind Commissions of King Charles I., commencing in 1627, made no provision for an extractor, and all extracts were signed by the clerks appointed by the king. After the passing of the Act of 15 March 1649, and down to the year 1741, except for a short period during the Commonwealth, the Clerk-Register and his deputies officiated both as teind clerks and extractors. The Crown then appointed a principal Teind Clerk with power



to appoint deputes, and it became the practice to appoint a depute as extractor. This was the rule in 1838, when the Act 1 & 2 Vict. c. 118 was passed, which, by sec. 26, conferred the appointment of extractor on a depute clerk then in office. Since that time only one depute clerk and extractor has been appointed. At present, there being no depute, the office is held by the Clerk of Teinds. The commission to a Keeper of Records, under the Act of 1838, also authorises him to act as assistant Extractor and assistant Clerk of Teinds.

**Extradition.**—The surrendering to a foreign State of a person accused or convicted of the commission of a crime within the jurisdiction of such State (Preamble, 1870 Act).

*History, etc.*—The practice of surrendering criminals, especially for political offences, can be traced to very early times. It existed in ancient Egypt (Brugsch's *Egypt under the Pharaohs*, ii. 73; *Jur. Rev.* viii. 297), and was not uncommon with the Romans (Clarke on *Extradition*, 3rd ed., chap. ii.; Forsyth's *Cases and Opinions in Constitutional Law*, p. 371; Bar (Gillespie), 1st ed., 17, 623). Several treaties for this purpose, entered into during the Middle Ages, are known. There was one in 1174 between Henry II. of England and William of Scotland (Clarke, p. 18). In the Laws of the Marches between England and Scotland (Thomson's *Acts*, i. 414, 416), there occur some rude provisions on the subject, whereby a criminal crossing the Border was to be given up if apprehended before he obtained the peace of the kingdom. In 1612 an Extradition Act (ch. 12) was passed by the Scottish Parliament, but it was declared to be of no effect if a similar Act was not passed in the first session of the English Parliament; but no such Act was passed in England. In modern times, practice has varied much, but the great preponderance of theoretical opinion is in favour of the right to demand, and the obligation to surrender, ordinary criminals, the argument for the negative being founded on the case of political offenders (cf. Clarke's examination (p. 1) of the authorities set forth in Wheaton's *International Law*; and Felix, etc.; Bar (Gillespie's 1st ed.), pp. 709 *et seq.*). It was frequently laid down by English authorities that the Crown had a right at common law to surrender criminals, but it is now finally settled that this is not law, and that the obligation does not exist apart from treaty. It is to the American Courts and jurists that credit is mainly due for the establishment of the doctrine on its present basis (Clarke, pp. 27, 28, etc.). It has been suggested that modern States are legally bound to enter into treaties with each other for the extradition of criminals; but even if this is not so, it is obvious that, owing to the modern facilities for travelling and the character of the modern criminal, no powerful State can allow its territory to become a place of refuge for such persons, and smaller States may be coerced into assisting their more powerful neighbours. In 1893 it appears that an excessive number of criminals were crowded out of civilisation and found a refuge in Argentina. (See Correspondence respecting the Extradition of Jabez Spencer Balfour, Argentine Republic, No. 1, 1893.)

*Statutes.*—The subject is now regulated by the Acts 33 & 34 Vict. c. 52; 36 & 37 Vict. c. 60; and 58 & 59 Vict. c. 33 (the Extradition Acts, 1870 to 1895). Under the leading Act (1870), when an arrangement has been made with any foreign State for the surrender to such State of any fugitive criminals, Her Majesty may by Order in Council direct that the Acts shall apply (under any restrictions or limitations) to such foreign State. The

order must recite or embody the arrangement, and must be laid before Parliament and published in the *London Gazette* (s. 1).

*Treaties.*—Under these Acts the following treaties have been entered into and are in force at the date of this publication:—Argentine Republic (Statutory Rules and Orders, 1894, p. 78); Austria (*London Gazette*, 1874, p. 1745); Belgium (*L. G.*, 1872, p. 4891; 1876, p. 4163; 1877, p. 4765); Brazil (*L. G.*, 1873, p. 5115); British India (St. R. & O., 1895, p. 238); Columbia (*L. G.*, 1889, p. 6995); Cyprus (St. R. & O., 1895, pp. 266 and 267); Denmark (*L. G.*, 1873, p. 3019); Ecuador (*L. G.*, 1886, 3158); France (*L. G.*, 1878, p. 3162); French Guiana and Trinidad (St. R. & O., 1894, p. 116); Germany (*L. G.*, 1872, p. 2939); German Protectorates (St. R. & O., 1895, p. 233); Guatemala (*L. G.*, 1886, p. 6115); Hayti (*L. G.*, 1876, p. 518); Honduras (*L. G.*, 1876, p. 514); Italy (*L. G.*, 1873, p. 1769); Liberia (St. R. & O., 1894, p. 88); Luxemburg (*L. G.*, 1881, p. 983); Mexico (*L. G.*, 1889, p. 2010); Monaco (St. R. & O., 1892, p. 455); Netherlands (*L. G.*, 1874, p. 3857); Orange Free State (St. R. & O., 1891, p. 279); Portugal (St. R. & O., 1894, p. 95); see as to Portuguese India, *L. G.*, 1891, p. 1339; Roumania (St. R. & O., 1894, p. 105); Russia (*L. G.*, 1887, p. 1434); Salvador (*L. G.*, 1883, p. 1); Spain (*L. G.*, 1878, p. 6685; 1889, p. 2953); Straits Settlements (St. R. & O., 1894, p. 417); Sweden and Norway (*L. G.*, 1873, p. 4405); Switzerland (*L. G.*, 1875, p. 701; 1879, pp. 1783 and 7369; 1880, p. 6785); Tonga (*L. G.*, 1882, p. 6136); Transvaal (*L. G.*, 1880, p. 4249); Tunis (*L. G.*, 1890, p. 2597); United States of America (*L. G.*, 1890, p. 1782); Uruguay (St. R. & O., 1891, p. 285). (See State Papers, "Treaty Series"; Kirchner *l'Extradition* (1883); Clarke on *Extradition*, Appendix, where the text of many treaties is given, *Law Reports, Digest, s.v.*; Index to "*London Gazette*," s.v.)

*Extradition Crimes.*—The act must be a crime by English as well as by the foreign law (*in re Bellencourt*, 1891, 2 Q. B. 122). The following is the statutory list:—Murder, and attempt and conspiracy to murder; manslaughter; counterfeiting, and altering money and uttering such; forgery, counterfeiting and altering and uttering; embezzlement and larceny; obtaining money or goods by false pretences; crimes by bankrupts against bankruptcy law; fraud by a bailee, banker, agent, factor, trustee, or director or member or public officer of a company, made criminal by any Act of Parliament; rape; abduction; child-stealing; burglary and housebreaking; arson; robbery with violence; threats with intent to extort; piracy; sinking or destroying a vessel at sea, or attempting or conspiring to do so; assaults on board a ship on the high seas with intent to destroy life or do grievous bodily harm; revolt or conspiracy to revolt on high seas against authority of the master; kidnapping and false imprisonment; perjury and subornation of perjury; and also offences under the English Larceny Act, 1861, and under the Acts 24 & 25 Vict. caps. 97, 98, 99, and 100 (which do not apply to Scotland); and any indictable offence under the Bankruptcy Acts (The Extradition Act, 1870, 1st Sched.; 1873 Act, Sched.).

Accessories are liable to be surrendered, tried, and punished as principals (1873 Act, s. 3).

The above list is to be construed according to "the law existing in England or in a British possession (as the case may be)." It would thus appear that even if the inquiry take place in Scotland under the 1895 Act, the magistrate must decide by the law of England whether the crime is an extradition one. In the ordinary case there is no difficulty, for the Scottish magistrate merely transmits the accused to London.

*Political Crimes.*—For these there is no extradition. If the accused proves that his surrender is really demanded for the purpose of trying or punishing him for such an offence, the Court or the Secretary of State will refuse extradition (1870 Act, s. 3). To come within the exception, the offence must be “incidental to and form part of political disturbances” (*in re Castioni*, 1891, 1 Q. B. 149), *e.g.*, if there are two “parties in the State, each seeking to impose a Government of its own choice on the other” (*in re Meunier*, 1894, 2 Q. B. 415). This provision applies only to a political offence which has been already committed (*in re Arton*, 1896, 1 Q. B. 108, where the plea was advanced that extradition was asked with ulterior political motives).

*Persons.*—If it is stipulated in the treaty that neither State shall be bound to surrender its own subjects, this stipulation limits the Statutes (*R. v. Wilson*, 3 Q. B. D. 42). Otherwise it is in the discretion of the Government to surrender British subjects (*in re Galwey*, 1896, 1 Q. B. 230); and *à fortiori* subjects of a third State (*R. v. Ganz*, 9 Q. B. D. 93).

A “fugitive criminal” means any person accused or convicted of an extradition crime committed within the jurisdiction of any foreign State, who is in, or is suspected of being in, some part of H.M. dominions (1870 Act, s. 26). A person condemned in France “*par contumace*” is treated as accused (1870 Act, s. 26; *in re Coppin*, L. R. 2 Ch. 47). Though the crime must be committed within the jurisdiction of the foreign country (*R. v. Lavandier, etc.*, 15 Cox C. C. 329), a criminal may be surrendered although he has never set foot therein (*R. v. Nillins*, 53 L. J. (N. S.) M. C. 157). But a criminal accused of, or undergoing sentence for, another crime in the United Kingdom will not be surrendered until he is discharged by acquittal or on expiration of his sentence (1870 Act, s. 3 (3)).

A criminal surrendered by a foreign State is not, until he has been restored or had an opportunity of returning to such foreign State, triable for any previous crime “other than such of the said crimes *as may be proved by the facts on which the surrender is grounded*” (1870 Act, s. 19; cf. the converse case in sec. 3 (2), and its application in *in re Alice Woodall*, 57 L. J. (N. S.) M. C. 72). The words italicised may remove the difficulties which may arise in claiming from foreign countries offenders against Scots criminal law. While England and British “possessions” are specially dealt with, the fact of a different system of law prevailing in Scotland is ignored in the Acts. Careful provision was made for this in the list of crimes given in the former French Treaty of 1852 (Clarke, p. 133; cf. the Austro-Hungarian Treaty). Can a prisoner surrendered for “larceny” be tried in Scotland for “theft”? (cf. *Lamirande* case, Clarke, App. cclii., and the remarks of Huddleston, B., *in re Parisot*, 5 T. L. R. 344; *in re Bellencontre* [1891], 2 Q. B. 122; *ex parte Terraz*, 4 Ex. D. 63, as to description of crimes in warrants; and *R. v. Finkelstein*, 16 Cox C. C. 107, as to extradition under wrong name. The treaties ought to receive a liberal interpretation, per *Ld. Russell, C. J.*, *in re Arton* (No. 2) [1896], 1 Q. B. 509, at p. 517). Wharton (*Conflict of Laws*, s. 846) says that the rule under discussion “does not preclude a technical variation of the offence charged.” (The note to this section gives many authorities.)

*Procedure.*—On the requisition of a diplomatic representative of a foreign State (including consul, etc., 1873 Act, s. 7), a Secretary of State may issue an order in statutory form (1870 Act, 2nd Sched.) requiring a “police magistrate” of the Metropolitan police courts (1870 Act, s. 26) to



issue a warrant. The magistrate, if satisfied that the evidence would justify the issue of a warrant if the crime had been committed, or the criminal convicted, in England, may issue such warrant, which runs in Scotland without endorsement (1870 Act, s. 13). The prisoner is brought before a magistrate (at Bow Street, in London), and if the warrants are duly authenticated, and the crime is not political, and is an extradition crime, and the evidence would justify the committal of the accused for trial in England, the magistrate commits him to a Middlesex prison and reports to the Secretary of State, but otherwise discharges him (1870 Act, ss. 9 and 10). When the magistrate has committed the accused to prison, he is *functus officio* (*R. v. Lushington, ex parte Otto* [1894], 1 Q. B. 420). The prisoner cannot be surrendered for fifteen days, during which he may apply for a writ of Habeas Corpus, when the Court may set him at liberty (*The Queen v. Portugal*, 16 Q. B. D. 487; 1870 Act, s. 11). If there is sufficient evidence to give the magistrate jurisdiction, the Court will not review his decision (*R. v. Maurer*, 10 Q. B. D. 513), and no appeal lies to the Court of Appeal (*ex parte Woodhall*, 20 Q. B. D. 832). The final surrender is by warrant of the Secretary of State, and he may also at any time order his discharge (1870 Act, ss. 11 and 7). The criminal cannot be surrendered before the expiry of fifteen days from his final committal (1870 Act, s. 3 (4)); and if not conveyed out of the United Kingdom within two months, he may be discharged by applying to the English High Court (1870 Act, s. 12).

By the Act of 1895, the Secretary may, on representation made by or on behalf of the criminal, that his removal to Bow Street would be dangerous to his life or health, direct the case to be heard at the place where the criminal is, before a magistrate named in the order,—in Scotland he may be a Sheriff or Sheriff-Substitute,—and the magistrate may order his custody in the place where he is, if removal would be dangerous to the criminal's life or health.

A Justice of the Peace, Sheriff, Sheriff-Substitute, or Magistrate may issue a warrant for the apprehension (or detention, *The Queen v. Weil*, 9 Q. B. D. 701) of a fugitive criminal on such evidence as would justify the issue of a warrant, if the crime had been committed or the criminal convicted within his own jurisdiction. The person issuing the warrant reports the fact of issue, the evidence and complaint, to a Secretary of State, who may order his discharge. The criminal, when apprehended, is brought before some person who has power to issue a warrant as above, and he grants warrants for bringing the criminal before a police magistrate (in London), who will discharge him, unless he receives from a Secretary of State an order that a requisition has been made (1870 Act, ss. 8, 26, Forms in Sched. 2). The further procedure in England is the same as if the order had been originally issued by the Secretary of State.

To procure the surrender of a fugitive criminal for trial in the Scottish Courts, the Lord Advocate communicates through the Home Secretary with the Foreign Secretary, who communicates through the British Diplomatic Agent with the Foreign Government, in accordance with the provisions of the special treaty.

As to extradition between different parts of H.M. dominions, see Fugitive Offenders Act, 1881, 44 & 45 Vict. c. 69. As to India, see J. D. Mayne's *Criminal Law of India*; America, Wharton, *Conflict of Laws*, Clarke; France, Fœlix (Demangeat), *Droit Int. Privé*, ii. ch. vii.; Germany, Bar (Gillespie), 1st ed., pp. 620, 707, Clarke, Calvo, *Dictionnaire*, s.v. "*Droit international*," 3rd ed., ii. 324.

**Extrinsic.**—See ADMISSIONS; OATH; PAROLE.

**Facility.**—See CIRCUMVENTION.

**Factor.**—In Scotland, the word factor is seldom used except in the limited sense of an agent for landed estate, or in connection with the FACTORS ACTS (*q.v.*) or Factor's Lien (see LIEN); and the subject of factor, in the sense of a mercantile agent, is more appropriately and particularly dealt with under AGENCY and PRINCIPAL AND AGENT. Bell (*Com.* i. 506), while stating that the names factor and agent are generally confounded, distinguishes the former from the latter as having authority to manage all the principal's affairs in the place where he resides, or in a particular department: he distinguishes a factor from a merchant in that he only buys and sells on commission; and from a BROKER (*q.v.*) in this, that he is intrusted with the possession and apparent ownership, as well as with the management and disposal, of the property of the principal. In England, a factor is distinguished from a broker in being intrusted with the possession of the goods, and being empowered to contract in his own name; and from an agent, in having a lien on the goods intrusted to him (*Stevens*, 1883, 25 Ch Div. 31; *Smith, Merc. Law*, 118 *et seq.*; *Baring*, 1818, 2 Barn. & Ald. 137).

See AGENCY; BROKER; FACTORS ACTS; FACTORY AND COMMISSION; PRINCIPAL AND AGENT; LIEN.

**Factors Acts.**—*History and Defects of the Factors Acts.*—The Factors Act, 1889 (52 & 53 Vict. c. 45), extended to Scotland by the Factors Act, 1890 (53 & 54 Vict. c. 40), is a consolidating Statute, which repeals and reproduces the provisions of a series of Acts passed in 1823, 1825, 1842, and 1877. The general object of this branch of legislation may be said to have been to bring the law of possession of moveable property, regarded as a title to dispose of it, into accordance with the general feeling and everyday usages of business men (see Factors Act, 1842, 5 & 6 Vict. c. 39, s. 1). The ordinary trade understanding is that if a man is in possession of mercantile commodities, or of documents of title, he may be assumed either to be their owner, or, if not, to be an agent having authority from the owner to dispose of them, and that, in the latter case, the owner should be the sufferer in the event of a fraudulent or improper disposition by the agent, rather than a third party transacting on the faith of the apparent authority to dispose conferred by the possession of the commodities or documents. To carry out this view to its fullest extent would be to assimilate the transfer of moveable property to that of negotiable instruments; the Factors Act steers a middle course between that extreme and the principle of the common law (more particularly in England), that the purchaser or pledgee of moveable property of the ordinary mercantile character took, except in the case of sales in market overt, no better title than his author, and was subject to all exceptions which were pleadable against him (per Ld. Blackburn in *Cole*, 1875, L. R. 10 C. P. 354, at p. 363). It may be remarked that in certain respects, *e.g.* the implied power of a factor or agent to pledge, the common law of Scotland was more advanced than that of England, and therefore the provisions of the Factors Acts are more nearly declaratory of the Scotch than of English law (cf. Bell, *Prin.* s. 1364, with opinion of Ld. Black-

burn in *Cole*, cited *supra*). In the Acts prior to that of 1877, the subject dealt with was the effect of dispositions made by an agent intrusted with the possession of goods or documents of title, but, as it was held that a purchaser who had obtained possession of the goods or the documents of title was not included (*McEwan*, 1847, 9 D. 434; *affd.* 6 Bell's App. 340; *Johnson*, 1877, 3 C. P. D. 32), the Act of 1877 added provisions relating to dispositions by buyers and sellers of goods. These provisions will be best considered in relation to the express enactments of the existing Factors Act, in which they are consolidated and amended. The scope of the Acts prior to 1877 will be found elaborately considered in the case of *Cole* (1875, L. R. 10 C. P. 354).

*Factors Act, 1889.*—The Factors Act, 1889, contains, in addition to the interpretation clause and certain supplemental clauses, two classes of provisions, the one headed "Dispositions by mercantile agents," the other, "Dispositions by buyers and sellers of goods." As these subjects are really entirely distinct, they must be considered separately.

*Meaning of Mercantile Agent.*—A mercantile agent is defined, for the purposes of the Act, as (s. 1) "a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods." This definition is new, as the former Acts referred generally to an "agent intrusted with the possession of goods," but it is not supposed that the class of persons to whom the Act applies is altered or enlarged. That class would seem to be confined to persons engaged in ordinary commercial transactions—as an agent, factor, or broker. Thus under the existing Act it has been held that an agent employed in retail trade (a pedlar employed to sell jewellery on commission) was not a mercantile agent within the meaning of the above definition (*Hastings*, [1893], 1 Q. B. 62). The former Acts were held not to be applicable to clerks, shopmen, or messengers (*Lamb*, 1862, 31 L. J. Q. B. 41, per *Ld. Blackburn* in *Cole*, 1875, L. R. 10 C. P. 354), or to persons employed solely as warehousemen, or as agents for the safe custody or forwarding of goods, without any authority to sell or pledge them (*Martinez y Gomez*, 1890, 17 R. 332; *Hellings*, 1875, 33 L. T. (N. S.) 380). Thus where A., a merchant in Spain, purchased goods from a firm of manufacturers in Ireland, and directed them to be sent to B., a merchant in Dundee, solely for the purpose of forwarding them to Spain, it was held that B. was not an agent within the meaning of the Factors Act, 1842, and that a person to whom he fraudulently pledged the goods could not appeal to its provisions in a question with A. (*Martinez y Gomez*, *supra*). And it was settled that the Acts did not apply to the case where a mercantile agent, who also carried on business of another kind, received goods in the course of that other business, and improperly sold or pledged them (*Monk*, 1831, 2 B. and Ad. 484; *Cole*, 1875, L. R. 10 C. P. 354; *City Bank*, 1880, 5 App. Ca. 664). It is probable that this important limitation of the scope of the Factors Act is still applicable under the Act of 1889, and that if goods were placed for safe custody in the hands of a warehouseman who happened also to be a broker, a fraudulent sale by him would not be protected, as a disposition by a mercantile agent. Again, the Act is not applicable to a person who merely pretends to be an agent; and thus, where a broker fraudulently obtained possession of goods from A., and sold them to B. under the pretence that he was an agent for A., it was held that B. could not maintain a title to the goods under the Factors Acts (*Gillman, Spence, & Co.*, 1889, 61 L. T. 281).



*Dispositions by a Mercantile Agent.*—The main provision with regard to dispositions by a mercantile agent, as defined above, is as follows (s. 2, subs. 1): “Where a mercantile agent is, with the consent of the owner, in possession of goods or of the documents of title to goods, any sale, pledge, or other disposition of the goods, made by him while acting in the ordinary course of business as a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.” An illustration of the class of cases to which this section is applicable may be found in the case of *Vickers* (1871, 9 M. (H. L.) 65). Vickers, who was in possession of iron warrants, issued by the Carron Co., instructed Campbell Bros., who acted as brokers and merchants in iron, to find a purchaser for them. On receiving notice that a purchaser had been found, he sent the iron warrants endorsed to Campbell Bros. That firm had not, in fact, found a purchaser, and, on receiving the warrants, they fraudulently pledged them for their own benefit. It was held that the Factors Acts were applicable, because Campbell Bros. were agents intrusted with the possession of documents of title, and therefore that the pledgee obtained a good title in a question with Vickers. In this case it may be noted that the possession of the documents of title was obtained by Campbell Bros. by the fraudulent statement that they had obtained a purchaser for them, and the case is therefore an authority for the statement that the Factors Act may apply even although the possession, as well as the disposition, of the goods was grounded on fraud. If, however, the mercantile agent obtains possession by a mere trick, as by representing himself to be somebody else, he has then absolutely no title to be in possession of the goods at all, and cannot give to a purchaser any better right than if he had obtained them by theft (*Cundy*, 1878, 3 App. Ca. 459). And it is expressly declared that where a mercantile agent pledges goods for a debt or liability of his own already existing, he can give no better title than he has himself (s. 4; *Martinez y Gomez*, 1890, 17 R. 332).

*Consent of the Owner.*—The phrase “consent of the owner” is defined partly by the Act and partly by decisions. It is to be presumed, in the absence of evidence to the contrary (s. 2, subs. 4). Where an agent has been in possession of goods with the consent of the owner, any disposition by him which would have been valid if the consent had continued, shall be valid although the consent has determined, provided that the party taking under the disposition does so without notice (s. 2, subs. 2). And where possession of documents of title is obtained by an agent by reason of his having been, with the consent of the owner, in possession of goods or of other documents of title, his possession shall be deemed to be with the consent of the owner. This meets a case, to which the former Factors Acts were held not to apply, where an agent was intrusted with the possession of a bill of lading, landed the cargo under it in a warehouse, and pledged the dock warrants (*Phillips*, 1840, 6 M. & W. 572). Where A. sold wine lying in a cellar to B., to be paid for by cash on delivery, and B., without paying the price, induced the keeper of the cellar to allow him to remove the wine, which he stored in another cellar and pledged to a third party, it was held that A. had never consented to B. being in possession of the wine, and that the Factors Act was not applicable (*Robinson*, 1896, 12 T. L. R. 174).

*Act does not Apply to Exceptional Contracts.*—The Act is only applicable to transactions in the ordinary course of business of a mercantile agent. Thus, as already stated, it does not apply to the business of a pedlar (*Hastings* [1893], 1 Q. B. 62). And where a jeweller, who was employed to sell an article, disposed of it for £30 in cash, and an obligation on the part of the purchaser to satisfy a debt due by the jeweller to a third party, it was held that this transaction was outside the ordinary course of business, and that, in consequence, the Factors Act was not applicable (*Biggs* [1894], 1 Q. B. 88).

*Pledge of Documents of Title.*—By sec. 3 it is declared that “a pledge of the documents of title to goods shall be deemed to be a pledge of the goods.” The question has recently been before the whole Court, in the case of *Inglis* (18 March 1897), whether this section introduces in the law of Scotland the principle that the mere pledge of a delivery-order, or other similar instrument, constitutes an effectual security over the goods, without that intimation to the warehouse-keeper which would have been necessary at common law (*Connal & Co.*, 1868, 6 M. 1095; and see DELIVERY-ORDER). In *Inglis* the question arose between a pledgee of a delivery-order for whisky lying in a bonded warehouse, who had not completed his right by intimation to the warehouse-keeper, and a creditor of the pledgor, who, after the date of the pledge, had arrested the whisky. It was held that sec. 3 of the Factors Act did not necessarily imply that a real right of pledge would be constituted by the mere transfer of a delivery-order, without the constructive possession involved in intimation to the warehouse-keeper, and the arrester was consequently preferred (*Inglis*, 1897, 4 S. L. T. No. 507).

*Further Provisions Relating to Mercantile Agents.*—The other provisions of the Act under the heading of “Dispositions by mercantile agents” may be briefly summarised. By sec. 5 it is provided that the consideration for the sale, pledge, or other disposition referred to in the previous sections may consist either in payment in cash, or of a transfer of other goods, documents of title, or securities, provided that where goods are pledged by an agent in consideration of the transfer of other goods or documents of title, the pledgee shall acquire no interest in the goods beyond the value of what he gave in exchange. In the application of this section to Scotland, it is provided that a sale, pledge, or other disposition shall not be valid unless made for valuable consideration as thus defined (Factors Act, 1890, s. 1, subs. 2). And it should be borne in mind that the provisions of the Act will only be applicable to a transaction in the nature of barter if such a transaction is in the ordinary course of the business of the mercantile agent (see s. 2, subs. 2, *supra*). By sec. 7 the lien (defined as including, in Scotland, a right of retention (Factors Act, 1890, s. 1, subs. 1)) of a consignee in respect of advances made to the consignor is extended to the case where a consignee has made advances to a person who has been placed in possession of goods for consignment or sale, or in whose name the goods have been shipped, provided that the consignee had no notice that that person was not the owner of the goods.

*Dispositions by Buyers or Sellers of Goods.*—The provisions of the Factors Act with regard to dispositions by buyers and sellers of goods are of importance, and seem likely to be applicable to a wider class of facts than those relating to mercantile agents. They apply to the cases of a seller of goods left in possession, and a purchaser of goods obtaining possession. By sec. 8, “Where a person, having sold goods, continues, or is, in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or

documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same." By sec. 9, "Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by an agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith, and without any notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner." These sections are reproduced in the Sale of Goods Act, 1893 (56 & 57 Viet. c. 71, s. 25), but are not repealed. They raise questions of considerable difficulty, some of which are still unsettled. It may be noted that the analogous sections of the Factors Act, 1877 (40 & 41 Viet. c. 39, now repealed), dealt solely with the case of a seller left in possession, or a buyer obtaining possession, of documents of title to goods; the present Act has added the case of possession of the actual goods. The result is that this part of the Act has been applied to transactions so widely distinct in character as the transfer of trade documents such as iron warrants, and the hiring of articles under the system of hire-purchase.

*Application to Contracts of Hire-Purchase.*—Before the present Act came into operation it was held that where a party obtained possession of an article under a contract of hire-purchase, by which it became his absolute property after a certain number of payments, nominally as hire, he was in possession under a contract of sale under a suspensive condition, by which the property in the article did not pass until the whole of the instalments were paid. The result was that if the hirer sold or pawned the article before paying all the instalments, the purchaser or pledgee obtained no title in a question with the party who had let out the article on hire (*Murdoch*, 1889, 16 R. 396). To this state of facts it has been held, in England, that the 9th section of the Factors Act, 1889 (quoted *supra*), is applicable, on the ground that the person taking the goods on hire-purchase is a person who has obtained possession of the goods, with the consent of the owner, under an agreement for sale, and therefore that a purchaser or pledgee from him takes the same title as if he had been a mercantile agent in possession of the goods,—that is, under sec. 2 of the Factors Act, takes the same title as if the owner of the goods had expressly consented to the sale or pledge (*Lee* [1893], 2 Q. B. 318). In order to make the 9th section applicable, however, there must be a sale, or an "agreement for sale," to the person placed in possession of the goods, and it has been held by the House of Lords that an "agreement for sale" implies an obligation on the part of the purchaser to buy, and that, without such an obligation, a mere option to the purchaser to buy, even although coupled with an obligation on the seller to sell, is not an agreement for sale (*Helby* [1895], A. C. 471). If, therefore, hire-purchase agreements are framed in future (as, in view of the decision in *Helby*, they probably will be) in terms which leave it in the option of the purchaser to return the article at any time, the hirers will, in spite of the Factors Act, be protected from any improper disposition on the part of the person taking on hire.



*Effect of Transfer of Document of Title.*—The provisions of the Factors Act with regard to possession of documents of title would appear to decide the vexed question whether a seller of goods, who had granted a delivery-order for them, could claim a right to retain them for the price in a question with the endorsee of the delivery-order. The earlier cases on the subject will be found collected in a previous article (DELIVERY-ORDER). It would seem clear, and has been decided in England (*Capital and Counties Bank*, 1896, 12 T. L. R. 216), that the endorsee of a delivery-order, taking it from a party who has obtained possession on a contract of sale, obtains, under sec. 9 of the Factors Act, a right to the goods which is preferable to any lien or right of retention which the original seller may possess in a question with the endorser. But an opinion has been expressed by Ld. Rutherford Clark that the Factors Act is not applicable to the case where a purchaser of goods, instead of endorsing to a sub-purchaser the delivery-orders granted by the seller, intimated these to the warehouse-keeper, and granted to the sub-purchaser delivery-orders issued by himself (*Broune & Co.*, 1893, 21 R. 173, at p. 192). This narrow construction of the Act is contrary to the opinion of the Lord Ordinary, Wellwood, in the same case, and to the English case of *Capital and Counties Bank* (cited *supra*).

*Further Application of Sections 8 and 9.*—So far the application of secs. 8 and 9, though not free from difficulty, is comparatively clear, but questions of great difficulty may arise from their provisions. The Act does not deal with the case—a very common one—where a purchaser of goods obtains possession of the documents of title, but the seller remains in possession of the goods. In such a case, should the purchaser transfer the document of title to A., and the seller resell the goods to B., it would appear that A. would obtain an unchallengeable title under sec. 9, as a purchaser from a person who had bought goods, and obtained possession of the documents of title, while B. would obtain an equally good title, under sec. 8, as a purchaser from a person who had sold goods, but remained in possession of them. It is difficult to see the *ratio decidendi* between two such competing titles.

A further question as to the effect of sec. 9 of the Factors Act might be raised should a competition arise between an endorsee of a document of title, and the seller of goods arresting them in his own hands, in security of the price, under the provisions of sec. 40 of the Sale of Goods Act, 1893. It would rather appear that if a purchaser should endorse the documents of title to a *bonâ fide* third party, it would be useless for the seller to arrest the goods in his own hands, because the endorsee is placed, by sec. 9, in the same position as if the endorser had been a mercantile agent for the original seller, and it is clear that a party who had sold goods through a mercantile agent could not arrest them for a debt due to him by the agent.

*Vendor's Lien in a Question with an Endorsee of a Document of Title.*—Sec. 10 of the Act deals with the effect of the transfer of a document of title upon the vendor's lien, a phrase which includes, in Scotland, a right of retention (Factors Act, 1890, s. 1, subs. 1). It is declared that such a transfer shall have the same effect for defeating the vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*. The result of this section is already arrived at by the 9th section (quoted *supra*), with the exception that sec. 9 is only applicable where the endorsee of the document of title had no notice of any lien of the original seller, while there is no such restriction on the scope of sec. 10,

which would therefore appear to be applicable even although the endorsee was aware of the fact that the endorser had not paid the price, and that the seller had therefore a lien over the goods. For a detailed discussion of the effect of the transfer of a bill of lading upon the right of stoppage *in transitu*, reference is made to the articles on BILL OF LADING and STOPPAGE IN TRANSITU: the general result may be given in the words of sec. 47 of the Sale of Goods Act, 1893, which deals with the effect of the transfer of a document of title. "If such transfer was by way of sale, the unpaid seller's right of lien or retention, or stoppage *in transitu* is defeated: and if such transfer were by way of pledge or other disposition for value, the unpaid seller's right of lien, or retention, or stoppage *in transitu* can only be exercised subject to the rights of the transferee." This section, dealing with the point more definitely, probably supersedes sec. 10 of the Factors Act in questions relating to a seller's lien for the price. It deals, however, solely with the lien of an unpaid seller, and it is quite possible that a seller of goods who has received the price may, nevertheless, have a right of retention over the goods for other debts due to him by the purchaser (*Melrose*, 1851, 13 D. 880). To such cases it would appear that sec. 10 of the Factors Act would be applicable, because the phrase "vendor's lien" which is there used is broadly defined, by the Factors Act, 1890, as including, in Scotland, a right of retention, and is not expressly limited to the vendor's lien for the price of the goods.

*Supplemental Provisions.*—The remaining sections of the Factors Act, 1889, which are classed as "supplemental," may be briefly summarised. For the purposes of the Act, the transfer of a document of title may be by endorsement, or by delivery, where such is the custom of trade, or where it is expressly declared to be so transferable, or is drawn to bearer (s. 11). A saving clause preserves the right of the owner of goods to recover them from his agent, or his trustee in bankruptcy, at any time before they are sold or pledged; to recover the goods, or, if they are sold, the price, from a person to whom they have been pledged by the agent, on satisfying the claim of the pledgee; and to recover the price of the goods from a party to whom they have been sold by the agent, subject to any right of set-off which such purchaser may have against the agent (s. 12). It is declared that the provisions of the Act are to be construed in amplification and not in derogation of the powers which an agent may exercise independently of the Act.

See BILL OF LADING; CONSIGNMENT; DOCUMENT OF TITLE; PLEDGE; SALE.

**Factory and Commission.**—A factory is a deed by which one authorises another to exercise a right or rights in his place. The word commission used to be applied to such a deed when the powers conferred were of higher importance than usual, but now factory and commission are practically synonymous.

A factory may be (1) *general*, conferring none but the most ordinary powers of administration; or (2) *special*, authorising the performance of a particular act or acts; or (3) *general and special*, in which the general powers are limited by special restrictions, or, as is more usual, the special powers extend the factor's general authority.

The factory is not a divestiture, and even during its subsistence the constituent may act for himself.

The clauses of a Factory are usually these: (1) The *narrative* clause,

containing the cause of granting; (2) the *nomination* of the factor or factors; (3) the clause or clauses containing the *general or special powers*, or both; (4) *declaration* that the factor's deeds shall be valid, and that the factory shall subsist until recalled; (5) *obligation* on factor to account; (6) and (7) *registration and testing clauses* (Bell, *Lectures*, i. 447; *Juridical Styles*, ii. 31; Menzies, *Conveyancing*, 472).

*When Special Powers necessary.*—Special powers must be conferred on the factor to enable him

(1) To sell or alienate heritage or valuable moveables (Stair, i. 12. 5; Ersk. iii. 3. 39; Bell, *Lectures*, i. 448; *Thomas*, 1829, 7 S. 828).

(2) To purchase or feu land, or to purchase valuable moveables (*Steuert*, 1857, 19 D. 1071; Bell, *supra*).

(3) To serve anyone as heir (31 & 32 Vict. c. 101, s. 29; *Gifford*, 1834, 12 S. 421; and see *Molle*, 13 Dec. 1811, F. C., 6 Pat. App. 168), or to enter vassals (Bell, *supra*).

(4) To compromise (*Hollinworth*, 21 January 1813, F. C.; *Bridges*, 1831, 10 S. 43) and to arbitrate (*Livingstone*, 8 S. 594).

(5) To grant leases.

(6) To remove tenants if they do not derive their possession from the factor (*York Buildings Co.*, 1764, Mor. 4054; *Thomson*, 1834, 12 S. 557; *Grosier*, 9 M. 826; 16 & 17 Vict. c. 80, s. 30).

(7) To borrow money on behalf of the constituent, and to bind him personally for repayment; or to dispoise his estate in security (Bell, *supra*; *Sinclair, Moorhead, & Co.*, 1880, 7 R. 874; but see *Thomson*, 1842, 5 D. 379, where the factor was allowed to borrow, to preserve the estate).

(8) To delegate his powers (*Dempster*, 1836 14 S. 521).

*Termination of Factory.*—The factory is terminated by

(1) Expiry of the time fixed, or performance of the act or acts authorised.

(2) Formal recall, or by granting a similar factory to another person (*Walker*, 1837, 16 S. 217; *Heddrington*, 1724, Mor. 4047).

(3) Bankruptcy of the constituent (Bell, *Com.* i. 525; and see *Broughton*, 17 Dec. 1814, F. C.).

(4) Supervening incapacity of the constituent is stated by Mr. Bell (*Conveyancing*, i. 452) to terminate the factory. But this is not necessarily the case, especially if the insanity be of short duration (*Wink*, 1849, 11 D. 995); and, in any event, *bond fide* contracts made by third parties, in ignorance of the incapacity, are apparently binding (*Pollock*, 10 Dec. 1811, F. C.; Menzies, 475; Bell, *Com.* i. 525).

(5) Death of constituent, or of one of several constituents acting jointly (*Stewart*, 1834, 7 W. & S. 211). But the factor is entitled to act until he receives authentic information of his constituent's death (*Campbell*, 1829, 3 W. & S. 384; *Kennedy*, 1843, 6 D. 40).

(6) Resignation by factor. But the constituent must be given due notice of his intention to resign, or the factor may be liable in damages for a precipitate resignation (Menzies, 474; Bell, *supra*).

(7) Death or supervening incapacity of factor.

The factor must account for his intromissions and pay over the balance, after deducting outlays and any salary or commission allowed to him. The office is presumed to be gratuitous when there is no mention of remuneration (*Orbiston*, 1736, Mor. 4063); and when remuneration is contemplated but not fixed, the Court will settle the amount in the event of disagreement (Menzies, 473; Bell, *supra*). The factor is entitled to a general discharge unless specific objections are stated to his accounts (*Mihl*, 1879, 6 R. 800). When the office is gratuitous, the factor is generally liable only for



intromissions (*Stewart*, 1830, 9 S. 178); if remunerated, he is responsible for loss due to carelessness or neglect (*Goldie*, 1757, Mor. 3527; *Fraser's Trs.*, 1830, 9 S. 178). But the factor must do everything *factoris nomine*, or he will be personally liable (*Ainslie*, 1739, Mor. 4065; H. L. 1743, 1 Pat. App. 340).

[3 Ersk. 3. 31; M. Bell, *Lectures*, i. 446; Menzies, *Conveyancing*, 472; Craigie, *Digest* (Mov.), 276.] See AGENCY; PRINCIPAL AND AGENT.

**Factory and Workshop Acts, 1878 to 1895.**—The first Factory Act passed in this country, in 1802, was entitled "an Act for the preservation of the health and morals of apprentices and others employed in cotton and other mills and cotton and other factories." From that date to 1874 there followed, at intervals of a few years, a long series of Statutes which greatly extended the scope of the original Act, but always with the same twofold object mainly in view, sanitary and educational. The Act of 1874 was entitled "an Act to make better provision for improving the health of women, young persons and children employed in manufactures, and the education of such children, and otherwise to amend the Factory Acts." These Statutes were consolidated by the Factory and Workshops Act, 1878 (41 Vict. c. 16). Since then there have been passed the Factory and Workshop Act, 1883 (46 & 47 Vict. c. 53); the Factory and Workshop Amendment (Scotland) Act, 1888 (51 & 52 Vict. c. 22); the Cotton Cloth Factories Act, 1889 (52 & 53 Vict. c. 62); the Factory and Workshop Act, 1891 (54 & 55 Vict. c. 75); and the Factory and Workshop Act, 1895 (58 & 59 Vict. c. 37). The Act of 1888 was repealed by that of 1891, and the collective title was given to the others by the Short Titles Act, 1896. They regulate the conditions of labour for women, young persons, and children, affecting that of adult male workers only to a small extent, or indirectly. The classes of works to which the Acts apply are: factories (textile and non-textile), workshops, workshops in which neither children nor young persons are employed, and workshops in which no child, young person, or woman is employed, and domestic workshops: while parts of the Acts are extended and special requirements made in regard to retail bakehouses, laundries, docks, wharves, quays, warehouses, buildings in course of construction, and buildings above a certain height.

#### SANITATION AND HEALTH.

Factories, workshops (including workshops conducted on the system of not employing any child, young person, or woman), and retail bakehouses are to be kept in a cleanly state and free from effluvia arising from any drain, water-closet, earth-closet, privy, urinal, or other nuisance (1878, s. 3; 1883, s. 17 (1); 1891, ss. 3 (1), 4 (1); 1895, s. 24 (1) (a)). Every factory or workshop must be provided with sufficient and suitable accommodation in the way of sanitary conveniences, having regard to the number of persons employed; and also, where persons of both sexes are employed, with proper separate accommodation for persons of each sex (1895, s. 35).

*Overcrowding* in a factory is forbidden when it is dangerous or injurious to the health of the persons employed (1878, s. 3; 1891, s. 5; 1895, s. 24 (1) (a)). There must be, both in factories and workshops, 250 cubic feet of space in any room to every person employed in it, and 400 cubic feet during any period of overtime. But power is given to a Secretary of State to modify this proportion for any period during which artificial light other than electric light is employed for illuminating purposes, and, as

regards any particular manufacturing process or handicraft, to substitute higher figures than those mentioned (1895, s. 1).

Sufficient *ventilation* is required in factories and retail bakehouses as will render harmless, so far as is practicable, all the gases, vapours, dust, or other impurities generated in the course of the manufacturing process or handicraft that may be injurious to health (1878, s. 3; 1883, s. 17 (1); 1891, s. 3 (1); 1895, s. 24 (1) (a)). An inspector may direct that a fan or other mechanical means of a proper construction be provided for ventilating a factory or workshop where grinding, glazing, or polishing on a wheel or any process is carried on by which dust or any gas, vapour, or other impurity is generated and inhaled by the workers to an injurious extent (1878, s. 36; 1895, ss. 24 (1) (a), 33).

*Limewashing*.—All the inside walls of the rooms of a factory or retail bakehouse, and all the ceilings or tops of such rooms (whether the walls, ceilings, or tops be plastered or not) and all the passages and staircases, must be limewashed once every fourteen months in the case of a factory, and every six months in the case of a retail bakehouse. But this is unnecessary where they have been painted with oil, or varnished within seven years. In that case they must be washed with hot water and soap once every fourteen months or six months as the case may be. But a Secretary of State may, by order, grant to any class of factories or parts thereof a special exemption from these requirements. This power he has exercised in orders gazetted 10 December 1895 (L. G., 7141) and 14 February, 1896 (L. G., 858) (1878, ss. 33, 34; 1883, s. 17; 1895, ss. 24 (1) (d), 27 (1)).

*Temperature*.—In every factory and workshop adequate measures must be taken for securing and maintaining a reasonable temperature in each room in which any person is employed (1895, s. 32 (1)).

It is illegal on the part of any occupier of a factory, workshop, laundry, or any place from which work is given out, or any contractor employed by any such occupier, to allow wearing apparel to be made, cleaned, or repaired in any dwelling-house or building occupied therewith, whilst any inmate of the dwelling-house is suffering from scarlet fever or small-pox. The burden is laid on such occupier or contractor of proving that he was not aware, and could not reasonably have been expected to become aware, of it (1895, s. 6.)

#### *Special Regulations for Particular Trades and Employments.*

*Cotton Cloth and other Textile Factories*.—Such factories are dealt with in the Act of 1889, which applies to every textile factory in which atmospheric humidity is artificially produced by steaming or other mechanical appliances, and which is not for the time being subject to special rules under the Act of 1891, s. 8 (1895, s. 31 (1)). Sched. A to the 1889 Act (for which a new table was substituted 27 April 1893) gives the maximum limits of humidity of the atmosphere permitted at given temperatures, the amount of moisture per cubic foot of air allowed being ascertained by a comparison of the figures in the respective columns of that schedule; under the proviso that the temperature shall not at any time be artificially raised above seventy degrees, except in so far as may be necessary in the process of giving humidity to the atmosphere, and according to the table in that schedule. And the fact that one of the wet bulb thermometers in the factory shows a higher figure than that given in the schedule is evidence that the amount of moisture exceeds the limit prescribed (1889, s. 5). Every factory to which the Act applies must be provided with two sets of standardised wet and dry bulb thermometers, of which one set is to be

fixed in the centre and one at the side of the factory, or in such other position as may be directed by an inspector, so as to be plainly visible to the operatives. The person in charge of the factory is to read the thermometers twice a day, viz. between ten and eleven in the forenoon and between three and four in the afternoon, and record the readings of each thermometer on a form provided for the purpose and given in Sched. B of the Act. These forms must be hung up near the thermometers, and forwarded at the end of each month to the inspector of the district, and a copy kept at the factory for reference. Each form is *prima facie* evidence of the humidity of the atmosphere and temperature in the factory at the time. A copy of the tables in Sched. A must also be hung up near each set of thermometers (1889, s. 7).

The occupier of any textile factory in which humidity of the atmosphere is artificially produced must give notice thereof in writing to the chief inspector of factories at or before the artificial production is commenced (1889, s. 8). Arrangements must then be made, to the satisfaction of the inspector for the district, for admitting not less than 600 cubic feet of fresh air per hour for each person employed therein (1889, s. 9). But if the occupier ceases to produce humidity by artificial means, he may give notice in writing of such cessation, and the provisions of the Act with respect to factories in which humidity is so produced will not apply (1889, s. 11).

*Bakehouses.*—No water-closet, earth-closet, privy, or ashpit is to be within, or communicate directly with, the bakehouse. Any cistern for supplying water to the bakehouse must be separate and distinct from any cistern for supplying water to a water-closet. No drain or pipe for carrying off fecal or sewage matter is to have an opening within the bakehouse (1883, s. 15; 1895, s. 27 (2)). No place underground is to be used as a bakehouse, unless it is so used at 1 January 1896 (1895, s. 27 (3)). But “underground” is not equivalent to “below the street level.” “The broad expression ‘a place underground’ has been designedly used by the framers of the Act, just to allow of the whole surroundings being considered, and so that each case might be decided in the light of its own circumstances” (per Sh. Fife in *Glasgow Local Authority*, 1896, 4 S. L. T. 256). No place on the same level with the bakehouse, and forming part of the same building, is to be used as a sleeping-place unless it is effectually separated from the bakehouse by a partition extending from the floor to the ceiling, and has an external glazed window of at least nine superficial feet in area, of which at the least four and a half superficial feet are made to open for ventilation (1878, s. 35; 1895, s. 27 (1)).

*Laundries.*—In every laundry worked by mechanical power a fan or other means is to be provided for regulating the temperature in every ironing-room, and for carrying away the steam in every wash-house in the laundry. All stoves for heating irons must be sufficiently separated from any ironing-room, and gas irons emitting noxious fumes are not to be used. The floors must be kept in good condition, and drained in such manner as will allow the water to flow off freely (1895, s. 22 (2)).

*Wet-spinning.*—A child, young person, or woman must not be employed in any part of a factory in which wet-spinning is carried on, unless sufficient means is employed for protecting the workers from being wetted, and, where hot water is used, for preventing the escape of steam into the room occupied by the workers (1878, s. 37).

*White-lead Factories.*—The Act of 1883 (s. 2) forbids the carrying on of such a factory unless it is certified by an inspector to be in conformity with the Act. Conformity with the Act consists in complying with the conditions



specified in the schedule appended thereto, or others made by the Secretary of State by way of amendment or addition (1883, s. 3, sched.).

*Factories and Workshops in which Lead, Arsenic, or other Poisonous Substance is used.*—Suitable washing conveniences must be provided for the use of persons employed in any department where such substances are used (1895, s. 30). Every medical practitioner attending, or called in to visit, a patient whom he believes to be suffering from lead, phosphorus, or arsenical poisoning, or anthrax, contracted in any factory or workshop, must (unless notice has been previously sent) send to the chief inspector of factories a notice stating the name and full postal address of the patient, and the disease from which he is believed to be suffering. Written notice of every such case occurring in a factory or workshop must be sent to the inspector and certifying surgeon for the district, and the provisions of the Acts with respect to accidents are to apply to any such case (1895, s. 29).

*Exception.*—The provisions which relate to the cleanliness (including limewashing, painting, varnishing, or washing), or to the freedom from effluvia, or to the overcrowding or ventilation of a factory or workshop, do not apply to domestic workshops (1878, s. 61).

*Special Regulations for Dangerous Trades.*—A Secretary of State may certify that, in his opinion, any machinery or process or particular description of manual labour, used in a factory or workshop (other than a domestic workshop), is dangerous or injurious to health, or dangerous to life or limb, either generally or in the case of women, children, or any other class of persons; or he may certify that the provision for the admission of fresh air is not sufficient, or that the quantity of dust generated or inhaled in any factory or workshop is dangerous or injurious to health. The expression factory or workshop here includes workshops conducted on the system of not employing any child, young person, or woman, and also docks, wharves, quays, warehouses, and buildings in course of construction.

When this certificate is granted, the chief inspector of factories may serve a notice in writing on the occupier (or owner in the case of a tenement factory, unless the occupier pays more than £200 a year in rent (1895, s. 24 (3), (7))), proposing such special rules or requirements as appear to him to be reasonably practicable and to meet the necessities of the case. This includes rules prohibiting the employment of or modifying or limiting the period of employment for all or any classes of persons in any such process or description of manual labour. The occupier (or owner) may serve a notice of objection within twenty-one days, in which he may suggest any modification of the rules or requirements, failing which the rules are established. If the Secretary of State does not assent to the proposed modifications, and he cannot come to an agreement with the occupier (or owner) of the factory, the matter in dispute is to be referred to arbitration in accordance with the rules set forth in the first schedule to the Act of 1891 (1891, ss. 8, 10, Sched. 1; 1895, ss. 23 (1) (iv.), 28 (1)). Any of the workmen employed in the class of employment to which the arbitration relates may, with consent of the arbitrators or umpire, be represented as if he were a party to the arbitration (1895, s. 12). When established, the rules must be published in the factory or workshop and enforced by the occupier (or owner) (1891, ss. 9, 11). Any special rules relating to the employment of adult workers must be laid before both Houses of Parliament for forty days before coming into operation (1895, s. 28 (1)). Provision is made for alteration or amendment of the rules (1891, s. 10). The following processes have been certified to be dangerous: the manufacture of white lead, paints, colours: in the extraction

of arsenic; the enamelling of iron plates (13 May 1892, L. G., 2832); the manufacture of lucifer matches, except such as are made with red or amorphous phosphorus (7 June 1892, L. G., 3352); the manufacture of earthenware, and of explosives in which di-nitro-benzole is used; chemical works; quarries (27 December 1892, L. G., 7642); the manufacture of red, orange, or yellow lead; lead smelting; the tinning and enamelling of iron hollow ware: electric-accumulator works; flax mills and linen factories (5 January 1894, L. G., 88); brass mixing and casting (11 May 1894, L. G., 2787); the tinning and enamelling of metal hollow-ware and cooking utensils (22 June 1894, L. G., 3577); in which yellow chromate of lead is used, or in which goods dyed with it undergo treatment (19 April 1895, L. G.); in mixing and casting of brass, gun metal, bell metal, white metal, delta metal, phosphor bronze, and manilla mixture (10 January 1896, L. G., 154); the bottling of aerated waters; the vulcanising of indiarubber by means of bi-sulphide of carbon; and wool-sorting. A committee of Parliament is at present inquiring into the dangerous trades.

*Powers and Duties of an Inspector.*—Where it appears to him that any act, neglect, or default in relation to any drain, water-closet, earth-closet, privy, ashpit, water supply, nuisance, or other matter in a factory or workshop (including workshops conducted on the system of not employing any child, young person, or woman), or laundry is punishable or remediable under the law relating to public health, but not under the Factory Acts, he is to give notice in writing to the sanitary authority in whose district the factory or workshop is situate. It is their duty to make such inquiry and take such action as is necessary for enforcing the law, and they must inform the inspector of the proceedings taken (1878, s. 4; 1891, s. 2 (1); 1895, s. 3 (1)). An inspector may, for the purposes of this provision, take with him into a factory or workshop any officer of the sanitary authority (1878, s. 4). Where proceedings are not taken within one month for punishing or remedying the act, neglect, or default, the inspector may take the like proceedings for that purpose as the sanitary authority might have taken; and he may recover expenses from them, so far as not recovered from any other person, and not incurred in unsuccessful proceedings (1891, s. 2 (2); 1895, s. 3 (2)). An inspector authorised by the Secretary of State to take proceedings for enforcing the law relating to public health has, for the purpose of his duties, the same powers with respect to workshops and laundries as he has with respect to factories. He may take the like proceedings as might be taken by the sanitary authority; and he is entitled to recover expenses from them, so far as not recovered from any other person, and not incurred in unsuccessful proceedings (1891, s. 1). Within an area and in certain classes of work which may be specified by the Secretary of State, an inspector may give notice to the occupier of a factory or workshop, or to any contractor employed by such occupier, or to the occupier of any place from which any work is given out, that any place in which work is carried on in connection with the business of the factory or workshop is injurious or dangerous to the health of the persons employed therein. If the occupier or contractor, after one month from receipt of the notice, gives out work to be done in that place, and the place is found, by the Court having cognisance of the case, to be so injurious or dangerous, he is liable to a fine (1895, s. 5). An inspector may direct that a fan or other mechanical means be used for ventilation, to prevent the inhalation of dust, gas, vapour, or other impurity to an injurious extent. This applies to factories and workshops where grinding, glazing, polishing on a wheel, or any process is carried on by which such dust or vapour is generated (1878, s. 36; 1895,

ss. 24 (1) (e), 33). When special rules have been established for any dangerous trade, an inspector must, if required, certify a copy, which is shown to his satisfaction to be a true copy of such special rules for the time being in force, for any factory or workshop (1891, s. 12).

An inspector must visit every textile factory in which humidity is artificially produced at least once in every three months, and examine the temperature, humidity of the atmosphere, ventilation, and quantity of fresh air in the factory, and report to the chief inspector. If, in the case of a cotton cloth factory, there is a contravention of, or non-compliance with, any of the provisions of the Act, he is to give notice in writing to the occupier of the act or omission (1889, ss. 10, 13). It is the duty of an inspector to certify to the Secretary of State when a white-lead factory is in conformity with the Act, and to give a copy of his certificate to the occupier. And if at any time thereafter it appears to him that the factory is not kept in conformity with the Act, he is to give notice to the occupier, specifying in what respects default is made. If the default is not remedied within a reasonable time, a Secretary of State may withdraw the certificate till that is done (1883, ss. 4, 5).

*Powers and Duties of the Sanitary Authority.*—The sanitation of workshops and retail bakehouses is under this body, who have all such powers of entry, inspection, taking legal proceedings and otherwise, as an inspector of factories (1883, s. 17 (1); 1891, s. 3 (2); *Glasgow Local Authority*, 1896, 4 S. L. T. 210). Where, on the certificate of a medical officer of health or inspector of nuisances, it appears to the sanitary authority that the lime-washing, cleansing, or purifying of a workshop (including workshops conducted on the system of not employing any child, young person, or woman), or of any part thereof, is necessary for the health of the persons employed, they are to give notice in writing to the owner or occupier of the workshop to limewash, cleanse, or purify it. Failing compliance within the time specified in the notice, the sanitary authority may cause the work to be done, and recover the expenses incurred from the person in default (1891, s. 4 (2) (3)). It is the duty of the sanitary authority to inform the inspector of the proceedings taken in consequence of any notice given by him in regard to an act, neglect, or default in relation to any drain, etc. (1895, s. 3 (1)). The medical officer of the sanitary authority must give written notice to the factory inspector of the district if he becomes aware of any child, young person, or woman being employed in a workshop (1891, s. 3 (3)).

*Powers of the Courts of Justice.*—Where, on the complaint of an inspector, a Court of summary jurisdiction is satisfied that any place used as a factory or workshop, or part thereof, is in such a condition that any manufacturing process or handicraft carried on there cannot be so carried on without danger to health, or to life or limb, the Court may prohibit the place from being used for the purpose of that process or handicraft until such works have been executed as are, in the opinion of the Court, necessary to remove the danger. But no such proceedings are to be taken in cases where proceedings might be taken by any sanitary authority, unless the inspector is authorised to take them by the Secretary of State, or in virtue of the sanitary authority taking no proceedings within a month of notice being given to them by the inspector (1895, ss. 2, 24 (4)). If a Court of summary jurisdiction is satisfied that any room or place used as a bakehouse is in such a state as to be, on sanitary grounds, unfit for such use, the Court may order means to be adopted by the occupier for the purpose of removing the ground of complaint (1883, s. 16).



## SAFETY.

Claims of reparation arising under the Factory Acts are usually of two kinds:—

1. They may be based upon an alleged contravention of the spirit of the Acts. "The object of these Acts is to protect children and young persons against themselves." If an employer, therefore, sets a person to work which is of too dangerous a character for one of his age to be employed in, the employer will be liable for any injury suffered thereby. And the nature of the ground of liability seems to displace any contention for contributory negligence (*Carty*, 1878, 6 R. 194; *Sharp*, 1885, 12 R. 574; *Ward*, 1890, 7 S. L. Rev. 37; *Morris*, 1895, 22 R. 336).

2. They may be founded on a contravention of one or more specific provisions in the Acts. Where the rule *volenti non fit injuria* was pleaded in defence to such a claim, Bramwell, B., said: "Assuming that he (deceased) did share his employer's knowledge, it must be remembered that the liability of the defendants here is not at common law, but by statute. They are in default to begin with, and the mere circumstance that the deceased entered on a dangerous employment does not exonerate them, unless he knew the nature of the risk to which, *in consequence of that default*, he was exposed" (*Britton*, 1872, L. R. 7 Ex. 130; cf. *Holmes*, 1861, 30 L. J. Ex. 135; 1862, 31 L. J. Ex. 356). There is no room in this case, either, for a plea of contributory negligence, so long as the employee acts within the scope of his employment (*Gibb*, 1875, 2 R. 886; *Carty*, *supra*; *Goldie*, 1886, 2 S. L. Rev. 213, 424; *Pringle*, 1894, 21 R. 532). But where a "child" removed fencing with which she had nothing whatever to do, and was killed in consequence, her employers were held not liable, even assuming they had violated the Acts by employing her as a full-timer (*Morris*, *supra*).

*Fencing, etc., of Machinery.*—Every hoist or teagle and every fly-wheel directly connected with the mechanical power, whether in the engine-house or not, and every part of any water-wheel or engine worked by any such power, must be securely fenced. "Securely fenced" does not mean "fenced in the ordinary manner used and approved as sufficient in the best regulated mills in the district at the time of the accident." It means fenced by "the best means of fencing the machinery known at the time" (*Schofield*, 1855, 24 L. T. 253). Every wheel-race not otherwise secured must be securely fenced close to its edge. All dangerous parts of the machinery and every part of the mill-gearing must either be securely fenced or be in such a position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced. What is to be fenced, etc., besides mill-gearing, is not every part of dangerous machinery, but every part of machinery which is a dangerous part (*Redgrave*, 1895, 1 Q. B. D. 876). All fencing must be constantly maintained in an efficient state while the parts required to be fenced are in motion or use, except where the parts are under repair, or under examination in connection with repair, or are necessarily exposed for the purpose of cleaning or lubricating, or for altering the gearing or arrangements of the parts of the machine (1878, s. 5; 1891, s. 6; 1895, s. 7). Unless the occupier pays more than £200 a year in rent, the owner of a tenement factory is liable for the observance of these provisions instead of the occupier (1895, s. 24 (1) (b), (7)).

Where grinding is carried on in a tenement factory, the owner is responsible for the observance of the regulations set forth in the first schedule to the Act of 1895. In every such tenement factory it is the

duty of the owner and occupier respectively to see that such parts of the horsing-chains, and of the hooks to which the chains are attached, as are supplied by them respectively, are kept in efficient condition. In every tenement factory where grinding or cutlery is carried on, the owner must provide that there shall be at all times instantaneous communication between each of the rooms where work is carried on, and both the engine-room and the boiler-house. These provisions do not apply to a textile factory (1895, s. 25).

*Cleaning of Machinery.*—A child is not to be allowed to clean any part of machinery in motion by the aid of mechanical power. Employers were found liable in reparation where a child was permitted to do so, although no direction had been given. The employers knew or were culpably ignorant of the fact that children in their factory were in the habit of cleaning machinery in motion (*Goldie*, 1886, 2 S. L. Rev. 213, 424). Young persons are not to be allowed to clean dangerous parts of the machinery while similarly in motion; and such parts of the machinery are presumed to be dangerous as are so notified by an inspector to the occupier. A young person or woman is not to be allowed to clean the mill-gearing in a factory while it is in motion for the purpose of propelling any part of the manufacturing machinery (1878, s. 9; 1895, s. 8; *Pringle*, 1891, 21 R. 532).

*Self-acting Machines.*—A child, young person, or woman is not to be allowed to work between the fixed and traversing parts of any self-acting machine while the machine is in motion by the action of mechanical power (1878, s. 9). A person employed in a factory must not be allowed to be in the space between the fixed and traversing portions of such a machine, unless the machine is stopped with the traversing portion on the outward run: but for the purpose of this provision the space in front of this machine is not included in the space mentioned. In a factory erected after 1 January 1896 the traversing carriage of any self-acting machine is not to be allowed to run out within a distance of eighteen inches from any fixed structure not being part of the machine, if the space over which it runs is a space over which any person is liable to pass (1895, s. 9).

*Provisions against Fire.*—Every factory constructed after 1 January 1892, in which more than forty persons are employed, must be furnished with a certificate from the sanitary authority of the district that it is provided on the storeys above the ground floor with such means of escape in case of fire as can reasonably be required in the circumstances (1891, s. 7 (1); 1895, s. 10 (4)). The owner of any other factory or workshop in which more than forty persons are employed may be compelled by the sanitary authority to make all necessary provision for escape in case of fire (1891, s. 7 (2); 1895, s. 10 (4)). The occupier of a factory or workshop may be compelled by a Court of summary jurisdiction, on complaint by an inspector, to provide one or more moveable fire-escapes (1895, s. 10 (1)). The doors of a factory or workshop, or of any room therein, in which any person is for the purpose of employment or meals, are not to be locked or bolted or fastened in such a manner that they cannot be easily and immediately opened from the inside (1895, s. 10 (2)). In every factory or workshop constructed after 1 January 1896 the doors of each room in which more than ten persons are employed must, except in the case of sliding doors, be constructed so as to open outwards (1895, s. 10 (3)).

*Powers and Duties of an Inspector.*—He may notify to the occupier of a factory (including docks, wharves, quays, warehouses, and buildings in course of construction) what parts of machinery are dangerous, and in the matter of cleaning they are held to be so unless the contrary is proved (1895, ss. 8,

23 (1) (v.)). He may present a complaint to a Court of summary jurisdiction, with the object of compelling an occupier of a factory or workshop to provide one or more moveable fire-escapes (1895, s. 10 (1)). For the purpose of enforcing the provisions of the Act of 1891 with respect to fire-escapes, he may give the like notice and take the like proceedings as he may do with regard to an act, neglect, or fault in relation to any drain, etc. (1895, s. 10 (5)). An inspector may present a complaint to a Court of summary jurisdiction, averring that any machine is in such a condition that it cannot be used without danger to life or limb, and praying the Court to prohibit its use absolutely or until it is repaired (1895, ss. 4, 23 (1) (v.)). (See also under *Sanitation and Health*, 1891, s. 8.)

*Powers and Duties of the Sanitary Authority.*—It is the duty of this authority to examine every factory and workshop, or ascertain whether they are provided with the requisite means of escape in case of fire. In the case of factories constructed after 1 January 1892, and workshops constructed after 1 January 1896, they are to grant a certificate that such means of escape are provided, and in the case of others they may serve on the owner a written notice specifying the measures necessary for providing such means of escape, and requiring him to carry out the same before a specified date. Any difference between the owner and the sanitary authority may, within one month after it arises, be referred to arbitration, in accordance with the provisions of the first schedule to the Act of 1891, except that the parties to the arbitration will be the sanitary authority and the owner of the factory or workshop. The notice of the sanitary authority is to be discharged, amended, or confirmed in accordance with the award (1891, s. 7; 1895, s. 11).

*Powers of the Courts of Justice.*—A Court of summary jurisdiction may, on complaint by an inspector, and on being satisfied that any machine used in a factory or workshop (including docks, wharves, quays, warehouses, and buildings in course of construction) is in such a condition that it cannot be used without danger to life or limb, by order prohibit the machine from being used, or, if it is capable of repair or alteration, from being used until it is duly repaired or altered. A Court of summary jurisdiction or a justice of peace may, on an application *ex parte* by the inspector, and on receiving evidence that the use of any such machine involves imminent danger to life, make an interim order prohibiting either absolutely, or subject to conditions, the use of the machine until the earliest opportunity for hearing and determining the complaint (1895, ss. 4, 23 (1) (v.)). (See also under *Sanitation and Health*.)

Where the owner of a factory or workshop is required by the sanitary authority to provide means of escape in case of fire, he may apply to a Court of summary jurisdiction craving that the occupier ought to bear or contribute to the expenses of complying therewith. The Court may hear the occupier, and make such order as appears just and equitable in the circumstances (1891, s. 7 (2)). The Court may, on complaint by an inspector, and on being satisfied that the provision of one or more moveable fire-escapes is required for the safety of any of the persons employed in a factory or workshop, by order require the occupier to provide such escapes (1895, s. 10 (1)).

#### ACCIDENTS.

Where there occurs in a factory or workshop any accident which either causes loss of life to a person employed there, or causes him such bodily injury as to prevent him on any of the three following working days from being



employed for five hours on his ordinary work, written notice must be sent to the inspector for the district. This notice must be sent, whether the accident be caused by machinery or not (*Lakeman*, 1868, 3 Q. B. 192). Notice must also be sent to the certifying surgeon of the district if the accident causes loss of life, or if it is produced by machinery moved by mechanical power, or through a vat, pan, or other structure filled with hot liquid or molten metal or other substance, or by explosion or escape of gas, steam, or metal. But this last notice is unnecessary if notice to a Government inspector is required by sec. 63 of the Explosives Act, 1875. The notice must state the residence of the person injured, and the place to which he has been removed. If the accident occurs in a factory or workshop where the occupier is not the actual employer of the person killed or injured, the actual employer must immediately report it to the occupier. These provisions do not extend to quarries to which the Quarries Act, 1894, applies, nor to workshops conducted on the system of not employing any child, young person, or woman (1878, s. 31; 1891, s. 22; 1895, s. 18; Quarries Act, 1894, s. 3 (6)). Neither do they apply to domestic workshops (1878, s. 61), but they do apply to laundries (1895, s. 22 (1) (iv.)), and to docks, wharves, quays, warehouses, and buildings in course of construction (1895, s. 23 (1) (ii.)). They also apply to any building exceeding thirty feet in height which is being constructed or repaired by means of a scaffolding, and any building exceeding thirty feet in height in which more than twenty persons not being domestic servants are employed for wages (1895, s. 23 (2)).

In the case of the death of any person engaged in any industrial employment, due to accident occurring in the course of such employment, an inquiry is held by the Sheriff in accordance with the Fatal Accidents Inquiry (Scotland) Act, 1895 (ss. 2, 4). Cases of lead, phosphorus, or arsenical poisoning or anthrax occurring in a factory or workshop are to be treated as accidents (1895, s. 29 (3)).

*Powers of the Secretary of State.*—He may direct that a formal investigation be held of any accident occurring in a factory or workshop (including workshops conducted on the system of not employing any child, young person, or woman), and its causes and circumstances. Such investigation is to be in accordance with the provisions of secs. 45 and 46 of the Coal Mines Regulations Act, 1887 (1895, s. 21).

*Powers of an Inspector.*—He may at all times inspect the register of accidents of a factory or workshop (1895, s. 20). He may appear at, take part in, and adduce evidence at an inquiry under the Fatal Accidents Act in relation to an accident in a factory or workshop (Fatal Accidents Inquiry (Scotland) Act, 1895, s. 5 (3)).

*Powers and Duties of a Certifying Surgeon.*—When he receives notice of an accident in a factory or a workshop, he must proceed there with the least possible delay and make a full investigation as to the nature and cause of the death or injury, and send a report to the inspector within the next twenty-four hours. For the purpose of this investigation he has the same powers as an inspector, and has also power to enter any room in a building to which the person killed or injured has been removed (1878, s. 32). He has the same power of inspection of a register of accidents as an inspector has (1895, s. 20).

#### EMPLOYMENT.

A child, young person, or woman is not to be employed in a factory or workshop except during the period of employment stated in the Acts: nor

may such a person be employed on a Sunday, subject to the exceptions mentioned therein (1878, ss. 10, 21; *Robinson*, 1890, 17 R. (J.C.) 62, 2 White, 511). The period of employment and the times allowed for meals must be regulated by any clock open to public view, which an inspector, by notice in writing, may name (1878, s. 76). An occupier of a factory, workshop, or laundry is forbidden knowingly to allow a woman to be employed therein within four weeks after she has given birth to a child. The Acts omit to include a female under eighteen years of age within this provision. No child under eleven years of age is to be employed in a factory, workshop, or laundry (1891, ss. 17, 18; 1895, s. 22 (1) (vi.)). A child who has not during any week attended school for all the attendances required is not to be employed in the following week until he has made up the deficient number of attendances. And the occupier of a factory, workshop, or laundry in which a child is employed must each Monday, or some other day appointed by the inspector, obtain from the teacher of the recognised efficient school attended by the child a certificate of his attendance. This certificate is to be kept for two months, and produced to the inspector when required (1878, ss. 23, 24; 1895, s. 22 (1) (iv.)). All the children in a factory or workshop are to be employed on the same system, and no change in the period of employment, times for meals, or system of employment of children is to be made without the statutory notices, and not oftener than once a quarter, unless for special cause allowed in writing by an inspector (1878, s. 19; 1895, s. 24 (1) (2)). A child, young person, or woman is not, except during the period of employment, to be employed on the business of a factory or workshop outside of that place on any day during which the child is employed therein, or the young person or woman is employed both before and after the dinner hour therein. And for the purpose of this regulation, a child, young person, or woman to whom any work is given out, or who is allowed to take out any work to be done by him or her outside a factory or workshop, is deemed to be employed outside thereof on the day on which the work is given or taken out. If a young person or woman is employed by the same employer on the same day both in a factory or workshop and in a shop, his or her whole period of employment is not to exceed the number of hours permitted for employment in the factory or workshop (1895, s. 16).

*Textile Factories, Print Works, Bleaching and Dyeing Works.*—The period of employment is from 6 a.m. to 6 p.m., or from 7 a.m. to 7 p.m., except on Saturday. On that day, if the period of employment begins at 6 a.m. it must end at 1 p.m. as regards employment in any manufacturing process, and 1.30 p.m. as regards employment for any purpose whatever. But if less than one hour is allowed for meals, this period is shortened by half an hour. If the period of employment begins at 7 a.m., it must end at 1.30 p.m. as regards employment in any manufacturing process, and 2 p.m. as regards employment for any purpose whatever. There must be allowed for meals during the period of employment on every day except Saturday not less than two hours, of which one hour at least must be before 3 p.m., and on Saturday not less than half an hour. A child, young person, or woman must not be employed for more than four and a half hours, and five hours in the case of printing and bleaching and dyeing works, without an interval of at least half an hour for a meal. A child is only to be employed in morning and afternoon sets or on alternate days. With the exception of Saturday, when a child is to work during the same hours as a young person, the morning set ends at 1 p.m., or at the beginning of dinner-time if that is earlier; and the afternoon set begins at 1 p.m., or the termination of dinner-

time if that is later. But where the dinner-time does not begin before 2 p.m. the afternoon set may begin at noon, and in that case the morning set must end at that hour. A child is not to be employed in two successive periods of seven days in a morning set; nor in two successive periods of seven days in an afternoon set; nor on two successive Saturdays; nor on Saturday if his period of employment on any other day of that week has exceeded five and a half hours. If a child is employed on the alternate day system, he is not to be employed on the same day of the week in two successive weeks (1878, ss. 11, 12, 40; 1883, s. 14). A male young person above sixteen years of age may be employed between 4 a.m. and 10 p.m. in the part of a textile factory in which a machine for the manufacture of lace is moved by steam, water, or other mechanical power. If he is so employed before the beginning or after the end of the ordinary period of employment, there must be allowed to him not less than nine hours for meals and absence from work during that extended period. He is not to be employed on any day after the end of the ordinary period of employment if he has been employed on that day before its commencement, nor before the beginning of the ordinary period of employment where he has been employed after its close on the previous day (1878, s. 44). In the factories specified in part vii. of the third Schedule to the Act of 1878, children, young persons, and women may be employed, between 1 November and 31 March following, continuously without an interval of at least half an hour for a meal, for the same period as if the factory were a non-textile factory. But they can only be so employed if the period of employment, as fixed by the occupier, begins at 7 a.m., and the whole time between that hour and 8 a.m. is allowed for meals. A Secretary of State may extend this exception to any class of textile factories in regard to which he is satisfied that the customary habits of the persons employed therein require it (1878, s. 48, Sched. 3, pt. vii.). This part of the schedule was extended by order gazetted 22 December 1882 (L. G., 6526).

*Non-Textile Factories and Workshops.*—The period of employment is from 6 a.m. to 6 p.m., or from 7 a.m. to 7 p.m., or from 8 a.m. to 8 p.m., on every day except Saturday. On that day it ends at 2 p.m., 3 p.m., or 4 p.m., according as it began at 6 a.m., 7 a.m., or 8 a.m. There must be allowed for meals during the period of employment, on every day except Saturday, not less than one hour and a half, of which one hour at least must be before 3 p.m., and on Saturday not less than half an hour. A child employed on the alternate day system must be allowed, on any day except Saturday, not less than two hours. A child, young person, or woman must not be employed for more than five hours without an interval of at least half an hour for a meal. A child is only to be employed on morning and afternoon sets, or (in a factory or workshop in which not less than two hours are allowed for meals on every day except Saturday) on alternate days. A morning set is to end at 1 p.m. or the beginning of dinner-time if that is earlier. An afternoon set is to begin at 1 p.m., or the termination of dinner-time being any hour later than 12.30 p.m., and ends on Saturday at 2 p.m. or 4 p.m., and on any other day at 6 p.m., 7 p.m., or 8 p.m., according as the morning set begins at 6 a.m., 7 a.m., or 8 a.m. When the dinner-time does not begin before 2 p.m., the afternoon set may begin at noon, and in that case the morning set must end at that hour. A child is not to be employed in two successive periods of seven days in a morning set; nor in two successive periods of seven days in an afternoon set; nor on Saturday in the same set in which he has been employed on any other day of that week. If a child is employed on the alternate day system, he must not be



employed on the same day of the week in two successive weeks; and the period of his employment on Saturday must end at 2 p.m., unless it began at 8 a.m., when it may end at 4 p.m. (1878, ss. 13, 14, 15 (1); 1883, s. 14; 1895, s. 36). The period of employment may be from 9 a.m. to 9 p.m. on any day except Saturday, in any class of non-textile factories or workshops to which an exception to that effect is granted by a Secretary of State. In that case the children's afternoon set must end at 8 p.m. (1878, s. 43). The exception has been granted to the fish-curing trade, by order gazetted 22 December 1882 (L. G. 6526), and to straw-hat manufactories, by order gazetted 3 May 1887 (L. G. 2446). Also, an occupier may substitute some other day of the week for Saturday, as regards the hour at which the period of employment is required to end, in any class to which a Secretary of State may grant this exception (1878, s. 46). An order allowing this exception in certain classes was gazetted 22 December 1882 (L. G. 6526).

In a workshop conducted on the system of not employing either children or young persons, and the occupier of which has served on an inspector notice of his intention so to conduct it, the period of employment of a woman must be a specified period of twelve hours taken between 6 a.m. and 10 p.m., except on Saturday, when it must be a specified period of eight hours between 6 a.m. and 4 p.m. She must be allowed not less than one hour and a half during that period for meals and absence from work on any day except Saturday, and not less than half an hour on Saturday (1878, s. 15 (2); 1891, s. 13).

When a young person or woman has not been actually employed for more than eight hours in any day of the week, and notice of such non-employment has been affixed in the factory or workshop and served on the inspector, the period of employment for that young person or woman on Saturday in that week may be from 6 a.m. to 4 p.m., with an interval of not less than two hours for meals (1878, s. 18; 1891, s. 15). In the factories or workshops, or parts thereof, named in the first schedule to the Act of 1878, a child or young person is not to be employed to the extent therein mentioned (1878, s. 38, sch. i.).

A male young person above sixteen years of age may be employed between 5 a.m. and 9 p.m. in the part of a *bakehouse* in which the process of baking is carried on. If he is so employed before the beginning or after the end of the ordinary period of employment, there must be allowed to him not less than seven hours for meals and absence from work during that extended period. He is not to be employed on any day after the end of the ordinary period of employment, if he has been employed on that day before its commencement; nor before the beginning of the ordinary period of employment, if he has been employed after its close on the previous day. Male young persons of sixteen years of age and upwards may be employed as if they were no longer young persons, in any bakehouses to which a Secretary of State may grant this special exception (1878, s. 45).

In the process of *turkey-red dyeing*, young persons and women may be employed on Saturday till 4.30 p.m., but the additional number of hours worked must be computed as part of the week's limit of work (1878, s. 47).

*Flax Scutch Mills.*—When the occupier of such a mill has served on an inspector notice of his intention to conduct the mill on the system of not employing children or young persons, the regulations with respect to the employment of women do not apply; provided the mill is worked intermittently, and for periods only which do not exceed, in the whole, six

months in any year (1878, s. 62). Flax Scotch mills are classed as non-textile factories (1878, s. 93, sch. 4 (19)).

*Laundries.*—The period of employment, exclusive of meal hours and absence from work, is not to exceed for children ten hours, for young persons twelve hours, and for women fourteen hours, in any consecutive twenty-four hours; nor a total for children of thirty hours, and for young persons and women of sixty hours, in any one week: in addition to overtime allowed in the case of women. A child, young person, or woman is not to be employed continuously for more than five hours without an interval of at least half an hour for a meal (1895, s. 22 (1)).

*Domestic Workshops.*—These are excepted from the foregoing regulations. The period of employment of a young person is to be from 6 a.m. to 9 p.m., except on Saturday, when it must end at 4 p.m. A young person must be allowed for meals and absence from work, during the period of employment, not less than four hours and a half, and two hours and a half on Saturday. A child is to be employed by morning and afternoon sets, the morning set being from 6 a.m. to 1 p.m., and the afternoon set from 1 p.m. to 8 p.m., and 4 p.m. on Saturday. A child is not to be employed before 1 p.m. in two successive periods of seven days; nor after 1 p.m. in two successive periods of seven days; nor on Saturday before (or after) 1 p.m., if on any other day in the same week he has been employed before (or after) that hour. A child is not to be employed for more than five hours without an interval of at least half an hour for a meal (1878, s. 16).

*Jews.*—Special provisions are made for employment in the case of persons of the Jewish religion (1878, ss. 50, 51: 1895, s. 14 (8)).

*Special Regulations with regard to Meals.*—All children, young persons, and women employed in a factory or workshop must have the times allowed for meals at the same hour of the day: and during a time allowed for a meal none of these persons is to be employed in the factory or workshop, or to be allowed to remain in any room in which a manufacturing process is then being carried on. But these regulations do not apply to domestic workshops; nor in the cases and to the extent mentioned in part ii. of the third schedule to the Act of 1878. The cases there specified may be extended by a Secretary of State, on his being satisfied that it is necessary by reason of the continuous nature of the process, or of special circumstances affecting any class of factories or workshops, or parts thereof. They have accordingly been extended by orders gazetted 22 December 1882 (L. G. 6527), 1 March 1887 (L. G. 1092), and April 1896 (L. G. 2731). No child, young person, or woman is to be allowed to take a meal or to remain during the times allowed for meals in the parts of factories or workshops mentioned in the second schedule to the Act of 1878. And this prohibition may be extended by a Secretary of State to any class of factories or workshops, or parts thereof, when the taking of meals therein appears to him to be specially injurious to health (1878, ss. 17, 39, 52, 61). The second schedule was extended by order gazetted 22 December 1882 (L. G. 6525).

*Holidays.*—The occupier of a factory, workshop, or laundry must allow to every child, young person, or woman employed therein two whole and eight half holidays in every year. The whole holidays are to be two days separated from each other by not less than three months, one being the fast day in the parish in which the factory, workshop, or laundry is situated, or some other day substituted for it by the occupier. If the factory, workshop, or laundry is within a burgh or police burgh, the two whole holidays are to be the two fast days in the burgh, or, where fast days have been abolished, two

days separated by not less than three months to be fixed by the magistrates or police commissioners, and public notice of which is to be given fourteen days before the date fixed. In lieu of any two half holidays, one whole holiday may be allowed. At least half of the half holidays must be between 15th March and 1st October. Cessation from work is not to be deemed a half or whole holiday unless the statutory notice has been given. A half holiday must comprise at least one half of the period of employment for young persons and women, on some day other than Saturday. It is illegal to employ a child, young person, or woman on a whole holiday or during the portion of the period of employment assigned for a half holiday (1878, ss. 22, 105, (2); 1891, ss. 16, 33 (4); 1895, s. 22 (1) (iii.)). In any class of non-textile factories or workshops to which the Secretary of State grants this exception, the occupier may allow all or any of the half holidays, or whole holidays in lieu of them, on different days to any of the children, young persons, or women, or to any sets of them (1878, s. 49). An order following on this was gazetted 22 December 1882 (L. G. 6527). The provisions with respect to the allowance of eight half holidays per annum do not apply to a male young person employed in day and night turns in any of the factories and workshops specified in part vi. of the third schedule to the Act of 1878 (1878, s. 58, sch. 3, pt. vi.). None of the provisions with regard to holidays applies to domestic workshops (1878, s. 61).

*Overtime.*—In the non-textile factories and workshops, and parts thereof, and warehouses specified in part iii. of the third schedule of the Act of 1878 (amended by 1895 s. 37 (2)), women may be employed between 6 a.m. and 8 p.m., or 7 a.m. and 9 p.m., or 8 a.m. and 10 p.m. When so employed, they must be allowed not less than two hours for meals, of which half an hour must be after 5 p.m. Such employment is forbidden for more than three days in any one week, or thirty days in any twelve months. Any class of non-textile factories or workshops, or parts thereof, may be added to the list in part iii. of this schedule in regard to which a Secretary of State is satisfied that it is necessary by reason of the material which is the subject of the process being liable to be spoiled by the weather, or by reason of press of work arising at certain recurring seasons of the year, or by reason of the liability of the business to a sudden press of orders arising from unforeseen events (1878, s. 53, sch. 3, pt. iii.; 1883, s. 13 (a); 1895, ss. 14 (1) (2), 37 (1)). The orders extending part iii. of the third schedule of the Act of 1878 are dated 22 December 1882 (L. G. 6529), 27 November 1883 (L. G. 5861), 14 March 1884 (L. G. 1263), 2 September 1884 (L. G. 3958) 10 May 1887 (L. G. 2581), 1 April 1888 (L. G. 2030), 17 October 1890 (L. G. 5509, E. G. 945), 22 August 1893 (L. G. 4771).

In the factories and workshops specified in part iv. of the third schedule to the Act of 1878, a child, young person, or woman may be employed beyond the period of employment, if the process in which he is employed is in an incomplete state at the end of that period. But these further periods are not to exceed thirty minutes at a time, nor, when added to the total number of hours of the periods of employment of such child, young person, or woman in that week, to raise that total above the number otherwise allowed. A Secretary of State may extend this exception to any class of non-textile factories or workshops, or parts thereof, in regard to which he is satisfied that the time for the completion of a process cannot be accurately fixed (1878, s. 54, sch. 3, pt. iv.). An order was accordingly made on 22 December 1882 (L. G. 6529).

Young persons and women may be employed, so far as is necessary for the purpose of preventing any damage which may arise from spontaneous



combustion in turkey-red dyeing, or from any extraordinary atmospheric influence in open-air bleaching (1878, s. 55).

Women may be employed in the factories and workshops, and parts thereof, specified in part v. of the third schedule to the Act of 1878 (as amended by order gazetted 22 August 1893 (L. G. 4771)), between 6 a.m. and 8 p.m., or between 7 a.m. and 9 p.m. But there must be allowed them for meals during that period not less than two hours, of which half an hour must be after 5 p.m. And such employment must not be for more than five days in any one week and sixty days in any twelve months. This exception may be extended to any class of non-textile factories or workshops, or parts thereof, in regard to which the Secretary of State is satisfied that it is necessary by reason of the perishable nature of the articles or material subject to the manufacturing process (1878, s. 56, sch. 3, pt. v.; 1883, s. 13 (b); 1895, s. 14 (2)).

In factories driven by water power which are liable to be stopped by drought or flood, and to which a Secretary of State has granted a special exception, young persons and women may be employed between 6 a.m. and 7 p.m. on such conditions as the Secretary of State may think proper. But no person is to be so deprived of the meal hours provided by the Acts, nor so employed on Saturday. In regard to factories liable to be stopped by drought, this special exception is not to extend to more than ninety-six days in any twelve months; and in regard to those liable to be stopped by floods, not more than forty-eight days in any twelve months. In no case is the overtime to extend beyond the period already lost in the previous twelve months (1878, s. 57). By order dated 22 December 1884 (L. G. 6528), this exception has been granted to factories in which water power alone is used to move the machinery.

Women in laundries may work overtime. But no woman is to work more than fourteen hours, and the overtime is not to exceed two hours, in any day. Overtime is not to be worked more than three days in a week, and thirty days in a year (1895, s. 22 (4)).

Nothing in the Acts is to be construed as authorising overtime work on Saturday, or on any day substituted for Saturday as a half holiday (1895, s. 14 (8)).

*Night Work.*—In the factories and workshops specified in part vi. of the third schedule to the Act of 1878, male young persons of fourteen years of age and upwards may be employed during the night. If they are so employed, the period of employment must not exceed twelve consecutive hours; and the provisions with respect to the allowance of times for meals must be observed with the necessary modifications as to the hour. A male young person employed during any part of the night must not be employed in any process other than one incidental to the business of the factory, as described in part i. of the fourth schedule to the same Act; nor during any part of the twelve hours preceding or succeeding the period of employment; nor on more than six nights, or, in the case of blast furnaces or paper mills, seven nights in any two weeks. The provisions with respect to the period of employment on Saturday do not apply to a male young person employed in day and night turns. A Secretary of State may extend this exception, so far as regards young persons of sixteen years of age and upwards, to any class of non-textile factories or workshops, or parts thereof, in regard to which he is satisfied that it is necessary by reason of the nature of the business requiring it to be carried on throughout the night; and part vi. of the third schedule has accordingly been extended by orders gazetted 22 December 1882 (L. G. 6529), 29 June 1888 (L. G. 3563), 14 June

1889 (L. G. 3227), 18 May (L. G. 2915) and 3 July 1894 (L. G. 3811), and 9 December 1895 (L. G. 7141), (1878, s. 58, sch. 3, pt. vi; 1895, s. 14 (3) (4)). Male young persons of fourteen years of age and upwards may be employed in three shifts of not more than eight hours each, provided there is an interval of two unemployed shifts between each two shifts of employment (1895, s. 38). Male young persons of sixteen years of age and upwards may be employed two nights a week as if they were no longer young persons, in newspaper printing-works in which the process is carried on on not more than two nights in the week. But they must not be so employed for more than twelve hours continuously (1878, s. 59; 1895, s. 14 (5)). A male young person of fourteen years of age may be employed in glass-works according to the accustomed hours of the works, subject to the following conditions:—The total number of hours of the periods of employment are not to exceed sixty in any one week. The periods of employment are not to exceed fourteen hours in four separate turns per week, or twelve hours in five separate turns, or ten hours in six separate turns, or any less number of hours in the accustomed number of separate turns per week, so that such number of turns do not exceed nine. A young person is not to work in any turn without an interval of time not less than one full turn; nor to be employed continuously for more than five hours without at least half an hour for a meal. This exception does not authorise employment on Sunday (1878, s. 60; 1895, s. 14 (6) (7)).

*Certificates of Fitness for Employment.*—Such a certificate is granted by the certifying surgeon for the district. It is only to be granted upon personal examination of the child or young person named in it, and the examination and signing of the certificate must take place at the factory or workshop where that person is or is to be employed; unless the number of children and young persons employed there is less than five, or for some special reason allowed by an inspector. The certificate is to the effect that the surgeon is satisfied that the person named is of the age specified, and has been personally examined by him, and is not incapacitated by disease or bodily infirmity for working daily for the time allowed by law in the factory named in the certificate. The age of the person named in the certificate of fitness may be proved by the production of a certificate of birth or other sufficient evidence (1878, ss. 27, 30, 73, 104; 1891, ss. 20, 33 (1), 35). All factories and workshops in the occupation of the same occupier, and in the district of the same certifying surgeon, or any of them, may be named in the certificate (1878, s. 30). And a certificate of fitness for employment in a tenement factory is valid for similar employment in any part of the same tenement factory (1895, s. 26).

No child or young person under the age of sixteen years is to be employed in a factory for more than seven, or, if the certifying surgeon for the district resides more than three miles from the factory, thirteen work-days, unless the occupier has obtained the necessary certificate of that child or young person's fitness for employment (1878, s. 27). The occupier of a workshop, unless coming under an order by the Secretary of State, is not compelled, but may if he chooses, obtain similar certificates for those employed by him as if his workshop were a factory (1878, ss. 28, 41). An occupier of a factory or workshop must discontinue, from the period named in the notice, the employment of any child or young person under sixteen years of age with regard to whom an inspector serves a written notice requiring such discontinuance of employment. But if, after such service, the certifying surgeon examines the child or young person, and certifies that he is not incapacitated by disease or bodily infirmity from doing his daily

legal work, he may be continued in employment (1878, s. 29). When a child becomes a young person, a fresh certificate must be obtained. The occupier must produce to an inspector at the factory or workshop the certificate of any child or young person which he is required to obtain (1878, s. 30).

The above provisions apply to domestic factories as if they were workshops (1878, s. 61).

*Powers of an Inspector.*—When an inspector is of opinion that a child or young person under sixteen years of age is incapacitated by disease or bodily infirmity for his legal daily work, he may serve written notice on the occupier of the factory or workshop where he is employed, requiring the discontinuance of his employment from a period named, being not less than one nor more than seven days after such service (1878, s. 29). An inspector may require the production, at the factory or workshop, of the certificate of fitness of any child or young person which the occupier is required to obtain. He may also, by notice in writing, annul a surgeon's certificate granted on evidence of age other than a certificate of birth, if he has reasonable cause to believe that the real age is less than that mentioned in the certificate (1878, s. 30).

*Duties of a Certifying Surgeon.*—A certifying surgeon is to grant certificates of fitness for employment of children and young persons in factories and workshops (1878, ss. 27, 28). If he refuses to grant one, he must, when required, give in writing and sign the reasons for his refusal (1878, s. 73). He is entitled to be paid according to the table given in the Act of 1878 (s. 74). He must make an annual report to the Secretary of State of the persons inspected and the results of the inspection (1891, s. 19), and must, if directed by the Secretary of State, make any special inquiry and re-examine any person. For this re-examination he is to be paid either by the Secretary of State or the occupier of the factory or workshop, according to the scale in the second schedule to the Act of 1895 (1895, s. 46, sch. 2).

#### EDUCATION.

##### See EDUCATION.

#### NOTICES, LISTS, REGISTERS.

Within one month after a person begins to occupy a factory, workshop (including any workshop conducted on the system of not employing any child, young person, or woman), or a laundry, he must serve on the inspector for the district a written notice containing the name of the factory, etc., the place where it is situate, the address to which he desires his letters to be addressed, the nature of the work, the nature of the moving power, and the name of the person or firm under which the business of the factory, etc., is to be carried on (1878, s. 75; 1891, s. 26; 1895, ss. 22 (1) (iv.), 41, 44). There must be kept constantly affixed at the entrance of a factory, workshop, or laundry, and such other parts as an inspector may direct, in such a position as to be easily read by the persons employed, (1) the prescribed abstract of the Act, (2) notices of the name and address of the inspector, (3) and of the certifying surgeon, (4) a notice of the clock (if any) by which the period of employment and times for meals are regulated, (5) a notice specifying the number of persons who may be employed in each room, and (6) every notice and document required by the Acts to be affixed in the factory or workshop (1878, ss. 76, 78; 1895, ss. 1 (3), 22 (1) (iv.), 24 (1) (f)). The occupier must specify in a notice affixed in the factory, workshop, or laundry, the period of employment, the times allowed for meals, and whether the children are employed in morning and afternoon sets or on alternate days. No change



is to be made until notice of an intention to make it has been served on an inspector and affixed in the factory, etc., and not oftener than once a quarter, unless for special cause allowed in writing by an inspector; but in a laundry the period and times specified may be varied before the beginning of employment on any day. In tenement factories the obligation is on the owner, unless different industries are carried on in the same tenement factory, or the occupier pays over £200 a year in rent (1878, s. 19; 1895, ss. 22 (1) (v.), 24 (1) (2) (7)). The occupier of a factory, workshop, or laundry must specify each half holiday or whole holiday in a notice affixed therein during the first week of January, and a copy of the notice is to be sent on the same day to the inspector for the district. The notice may be changed by a subsequent one, similarly affixed and sent not less than fourteen days before the holiday to which it applies (1878, s. 22 (1) (4), 105 (2); 1891, ss. 16, 33 (4); 1895, s. 22 (1) (iv)). Every occupier of a factory or workshop must keep a register of accidents, and enter therein every accident of which notice is required, within one week after its occurrence. This register must at all times be open for inspection by the inspector and certifying surgeon for the district (1895, s. 20. See under *Accidents*). He must also, on or before 1st March in each year, send to the inspector of the district, on behalf of the Secretary of State, a correct return specifying, with respect to the year ending on the preceding 31 December, the number of persons employed in the factory or workshop, with such particulars as to their age and sex as the Secretary of State may direct (1895, s. 34).

If an occupier wishes to avail himself of any special exception relating to a particular class of factories or workshops, he must, seven days before doing so, serve on the inspector for the district, and affix in the factory, workshop, or laundry, notice of his intention, and must keep this notice affixed so long as he avails himself of the exception. This notice must specify the hours for the beginning and end of the period of employment, and the times to be allowed for meals to every child, young person, or woman, when they differ from the ordinary hours or times. An occupier must enter in the register, and report to an inspector, the prescribed particulars respecting the employment of a child, young person, or woman, in pursuance of an exception; and when the exception relates to overtime, he must cause a notice containing the prescribed particulars respecting the employment to be kept affixed in the factory, workshop, or laundry during the prescribed time. These requirements of entry and report do not apply in the case of domestic workshops, except so far as a Secretary of State may prescribe. The report to an inspector must, in the case of an exception relating to employment overtime, be sent not later than eight o'clock in the evening on which the person is employed in pursuance of the exception (1878, s. 66; 1891, s. 14; 1895, ss. 22 (4) (d), 44 (1)). The following notices must be affixed in the factories and workshops to which they apply, viz.: notice of the prohibitions against children and young persons being employed in certain scheduled factories or workshops, or parts thereof, and against children, young persons, and women being allowed to remain during meal-times in certain scheduled parts of factories and workshops (1878, ss. 38, 39, sch. 1, 2), notice of the substitution of any day for Saturday as regards the end of the period of employment (1878, s. 46). In the non-textile factories and workshops and warehouses, and parts thereof, specified in part iii. of the third schedule to the Act of 1878, and in every factory or workshop in which a child or young person is prohibited from being employed without a certificate of fitness, and in any other to which it seems expedient to a Secretary of State to extend this requirement, the occupier

must keep, in the prescribed form and with the prescribed particulars, registers of the children and young persons employed, and of their employment, and of other matters under the Acts; and he must send to an inspector such extracts from the registers as he may require for the execution of his duties (1878, ss. 53, 77, sch. 3, pt. iii. 1895, ss. 15, 37, 43). When a workshop is conducted on the system of not employing any child, young person, or woman, no change on that system is to be made till notice of intention to make the change is served on the inspector by the occupier, and *vice versa*, and a change in the system is not to be made oftener than once a quarter unless for special cause allowed in writing by an inspector (1878, s. 61). The occupier of a flax scutch mill, desirous of conducting the mill on the system of not employing children or young persons, must serve notice of such intention on an inspector, and until this is done the mill is not deemed to be conducted on that system (1878, s. 62). The occupier of a workshop conducted on the system of not employing children or young persons must give an inspector notice of his intention so to conduct it, before he can avail himself of the extended period of employment for women (1891, s. 13). The occupier of any textile factory in which humidity of the atmosphere is artificially produced, must give notice thereof in writing to the chief inspector of factories at or before the time when such artificial production is commenced (1889, s. 8; 1895, s. 31). When an occupier ceases to produce humidity by artificial means, notice of such cessation must be given, and from the date of this notice the provisions with respect to factories in which artificial production of humidity takes place do not apply (1889, s. 11).

The occupier of every factory and workshop (including any workshop conducted on the system of not employing any child, young person, or woman therein), and any place from which any work of making wearing apparel for sale is given out, and every contractor employed by any such occupier in the business of the factory or workshop, or in connection with the said work, must, if the Secretary of State by order so requires, and subject to any exceptions mentioned in the order, keep in the prescribed form, and with the prescribed particulars, lists showing the names of all persons directly employed by him, either as workman or contractor, in such business outside the factory or workshop, and the places where they are employed. These lists are to be open to inspection by any inspector or officer of a sanitary authority. He must also, on or before 1 March and 1 September in each year, send to the inspector for the district a list showing the names of all persons directly employed by him either as workmen or as contractors, in the business of the factory or workshop outside thereof, and the places where they are employed (1891, s. 27; 1895, s. 42). An order in accordance with these provisions was gazetted 4 February 1896 (L. G. 651).

In the worsted and woollen, other than the hosiery, trades, and in all textile factories and any non-textile factories and workshops to which the Secretary of State may by order apply the provisions, there are requirements for publishing particulars of the rate of wages applicable to the work to be done, and also particulars of the work to which that rate is to be applied, to enable every piece-worker to compute the total amount of wages payable to him (1891, s. 24; 1895, s. 40 (1) (5) (6)).

Notices, etc., may be served by delivery or by post (1878, s. 79).

*Exception.*—The provisions relating to the affixing of any notice or abstract in a factory or workshop, or specifying any matter in the notice so affixed, do not apply to domestic workshops (1878, s. 61).

## ADMINISTRATION.

*Inspectors.*—They are appointed by a Secretary of State, and their appointment is published in the *London Gazette*. A person who is the occupier of a factory or workshop, or is directly or indirectly interested therein, or in any process or business carried on therein, or in a patent connected therewith, or is employed in or about a factory or workshop, cannot act as an inspector. Inspectors are not liable to serve in any parochial or municipal office. Annual reports of their proceedings are laid before both Houses of Parliament (1878, s. 67). They are to be furnished with certificates of their appointments, which they must, if required, produce to the occupier of a factory or workshop on applying for admission (1878, s. 70).

The powers of an inspector for the purpose of the execution of the Acts are: (1) to enter, inspect, and examine at all reasonable times, by day and night, a factory and a workshop, and every part thereof, when he has reasonable cause to believe that any person is employed therein, and to enter by day any place which he has reasonable cause to believe to be a factory or workshop: (2) to take with him, in either case, a constable into a factory or workshop in which he has reasonable cause to apprehend any serious obstacle in the execution of his duty; (3) to require the production of the registers, certificates, notices, and documents kept in pursuance of the Acts, and to inspect, examine, and copy the same; (4) to make such examination and inquiry as may be necessary to ascertain whether the enactments for the time being in force relating to public health and the enactments of the Factory Acts are complied with, so far as respects the factory or workshop and the persons employed therein: (5) to enter any school in which he has reasonable cause to believe that children employed in a factory or workshop are for the time being educated; (6) to examine, either alone, or in the presence of another person, as he thinks fit, with respect to matters under the Acts, every person whom he finds in a factory or workshop, or such a school as aforesaid, or whom he has reasonable cause to believe to be or to have been within the preceding two months employed in a factory or workshop, and to require such person to be so examined, and to sign a declaration of the truth of the matters respecting which he is so examined: and (7) to exercise such other powers as may be necessary for carrying the Acts into effect. The occupier of every factory and workshop, his agents and servants, must furnish the means required by an inspector as necessary for the exercise of his powers under the Acts (1878, ss. 68, 69; 1891, s. 25; 1895, s. 45). The above powers apply also to laundries, docks, wharves, quays, warehouses, and buildings in course of construction (1895, ss. 22 (1) (iv.), 23 (1) (iii)).

*Certifying Surgeon.*—He must be a duly registered medical practitioner. No one can be a certifying surgeon for any factory or workshop of which he is occupier, or if he is directly or indirectly interested in it, or in any process or business carried on there, or in a patent connected with it (1878, s. 72). Where there is no certifying surgeon resident within three miles of a factory or workshop, the poor-law medical officer is for the time being certifying surgeon for that factory or workshop (1878, s. 71).

*Legal Proceedings.*—All offences under the Acts are prosecuted, and all penalties recovered, under the provisions of the Summary Jurisdiction Acts, at the instance of the procurator-fiscal or an inspector. An inspector, if authorised by the Secretary of State, may, although he is not a counsel or solicitor or law agent, prosecute, conduct, or defend any proceeding arising



under the Acts, or in the discharge of his duties as an inspector. The Court may make, and from time to time alter or vary, summary orders under the Acts, on petition by the procurator-fiscal or inspector. Any person may appeal from an order or conviction to the Court of Justiciary, in terms of the Heritable Jurisdictions (Scotland) Act, 1746 (20 Geo. II. c. 43), and amending Acts, or the Summary Prosecutions Appeal (Scotland) Act, 1875 (1878, ss. 89, 90, 91 (6), 105; 1895, s. 51). In summary proceedings for offences and fines, a petition or complaint may be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district, or, in case of an inquest being held in relation to the offence, within two months after the conclusion of the inquest, so however that it is not laid after the expiration of six months from the commission of the offence (1878, s. 91 (1); 1891, s. 29; 1895, s. 44 (2)). Where an inspector is satisfied that the occupier had used due diligence to enforce the execution of the Acts, and also by what person the offence was committed, and that it was committed without the knowledge, consent, or connivance of the occupier, and in contravention of his orders, he is to proceed against the person whom he believes to be the actual offender (1878, s. 87). It is sufficient to allege that a factory or workshop is a factory or workshop within the meaning of the Acts, without more; and to state the name of the ostensible occupier of the factory or workshop, or the title of the firm by which the occupier is usually known (1878, s. 91 (4) (5)). It is no objection to the competency of an inspector to give evidence as a witness, in any prosecution for offences under the Acts, that the prosecution is brought at his instance: and a person charged with an offence may, if he thinks fit, tender himself to be examined on his own behalf, and give evidence in the same manner as any other witness (1878, s. 105; 1895, s. 49).

If a person is found in a factory or workshop, except at meal-times or while all the machinery of the factory is stopped, or for the sole purpose of bringing food to the persons employed there, between four and five o'clock in the afternoon, he is, until the contrary is proved, deemed to be then employed in the factory or workshop. But yards, playgrounds, and places open to the public view, schoolrooms, waiting-rooms, and other rooms belonging to the factory or workshop in which no machinery is used or manufacturing process is carried on, is not to be taken to be any part of the factory or workshop. This enactment does not apply to domestic factories and workshops. Where a child or young person is, in the opinion of the Court, apparently of the age alleged by the petitioner, pursuer, or complainer, it lies on the defender or respondent to prove the contrary. A declaration in writing by a certifying surgeon for the district, that after examination he believes the person to be under the age set forth, is evidence of his age. A Sheriff Clerk is empowered to give an inspector a certified copy of a conviction for an offence against the Acts, upon a written request and payment of one shilling (1878, ss. 61, 92, 105; 1891, s. 30).

*Fines and Penalties.*—Where an offence, for which the occupier of a factory or workshop is liable to a fine, has in fact been committed by some other person, that person is liable to the same fine as if he were the occupier (1878, s. 86). Where the occupier is charged with an offence, he is entitled to have some other person whom he charges as the actual offender brought before the Court; and if the occupier proves that he had used due diligence to enforce the execution of the Acts, and that the other person had committed the offence without his knowledge, consent, or connivance, the other person is to be convicted of the offence, and the occupier is exempt from any fine (1878, s. 87). Every person convicted of an offence is liable in costs

(1878, s. 105 (19); 1895, s. 50); and all fines in default of payment, and all orders failing compliance, may be enforced by imprisonment not exceeding three months (1878, s. 105 (17)). The provisions of the Acts in regard to fines apply to laundries (1895, s. 22 (1) (iv.)). A person is not liable in respect of a repetition of the same kind of offence from day to day, except where the repetition occurs after a complaint has been laid for the previous offence, or the offence is one of employing two or more children, young persons, or women contrary to the Acts (1878, s. 88).

If a factory or workshop is not kept in conformity with the principal Act, the occupier is liable to a fine not exceeding £10, and, in case of a second or subsequent conviction in relation to a factory within two years, the fine is to be not less than £1 for each offence. The Court may, in addition to or instead of inflicting a fine, order means to be adopted for bringing the factory or workshop into conformity with the Act. If this order is not complied with within the time specified, or as enlarged upon application, the occupier is liable to a fine not exceeding £1 for every day the non-compliance continues (1878, s. 81; 1891, s. 28). A factory or workshop is not kept in conformity with the principal Act in which there is a contravention of the provisions of the following sections (1878, ss. 3, 5, 33, 34, 37; 1891, s. 7 (1); 1895, ss. 9 (1), 10, 25, 27 (3), 32, 35); or of any requirement made under the Act of 1891 (1891, s. 9 (2)); or of the directions of an inspector under the following sections (1878, s. 36; 1895, s. 33). Where the occupier of a factory or workshop avails himself of an exception under the Act of 1878 (ss. 33-66), and a condition relating to cleanliness, ventilation, or overcrowding is not observed, the factory or workshop is deemed not to be kept in conformity with the principal Act (1878, s. 66).

Where a child, young person, or woman is employed contrary to the provisions of the principal Act, the occupier of the factory or workshop is liable to a fine not exceeding £3, or, if the offence was committed during the night, £5 for each person; and in domestic factories and workshops £1, or, if the offence was committed during the night, £2 for each person. In case of a second or subsequent conviction in relation to a factory within two years, the fine is to be not less than £1 for each offence (1878, ss. 16, 83; 1891, ss. 28, 37 (2)). When women remained at work after the close of the period of employment entirely of their own free will, and after being told not to stay late, they were held not to be employed contrary to the Act (*Robinson*, 1890, 17 R. (J. C.) 62, 2 White, 511). The offence of employing a person contrary to the provisions of the principal Act includes allowing a child, young person, or woman to clean or work in contravention of 1878, s. 9, employing such a person on a holiday (1878, s. 22), allowing such a person to take a meal or to remain in any part of a factory or workshop in contravention of 1878, s. 39, employing such a person in a factory or workshop in alleged pursuance of an exception under the Act of 1878 (ss. 33-66), where a condition of such exception is not observed (1878, s. 66), the not allowing to any such person times for meals and absence from work as required by the Acts, or employing any such person in the factory or workshop, or allowing him to remain in any room during such times in contravention of the provisions of the Acts (1878, s. 83), and also the allowing any person to be in the space between the fixed and traversing portions of a self-acting machine in contravention of 1895, s. 9. The parent of a child or young person employed in a factory or workshop contrary to the principal Act is liable to a fine not exceeding £1 for each offence, unless it appears that the offence was committed without his consent, connivance, or wilful default.

A parent who neglects to cause a child to attend school in accordance with the Acts is liable to the same fine (1878, s. 84).

If any person is killed or suffers bodily injury in consequence of the occupier of a factory having neglected to fence any machinery, or the occupier of a factory or workshop having neglected to fence any vat, pan, or other structure required to be securely fenced, or to maintain such fencing, or if any person is killed or suffers any bodily injury, or injury directly to health, in consequence of the occupier of a factory or workshop having neglected to observe any provision of the Acts or any special rule or requirement, the occupier is liable to a fine not exceeding £100. The whole or any part of this fine may be applied for the benefit of the injured person or his family, or otherwise as a Secretary of State determines. In case of a second or subsequent conviction for the same offence in relation to a factory within two years from the last, the fine is to be not less than £1 for each offence. This provision applies to docks, wharves, quays, warehouses, and buildings in course of construction; and in tenement factories the owner is liable instead of the occupier, except so far as relates to machinery supplied by the occupier, unless the latter pays over £200 a year in rent (1878, s. 82; 1891, s. 28; 1895, ss. 13, 23 (1) (i.), 24 (1) (b)). The question whether the above penalty has been substituted for any duty of recompense at common law has not been discussed, but there seems no reason to believe that it has. (*Couch*, 1854, 3 E. and B. 402, 23 L. J. Q. B. 121; *Wolverhampton New Waterworks Co.*, 1859, 28 L. J. C. P. 242, per Willes, J., 246; *Atkinson*, 1877, L. R. 2 Ex. D. 441; *Beven on Negligence*, i. 365 *et seq.*)

Other offences are:—

Failure to comply with an order of the Sanitary authority *re* lime-washing, etc. Penalty—fine not exceeding ten shillings per day during default (1891, s. 4).

Letting, occupying, continuing to let, or knowingly suffering to be occupied, any place contiguous to a bakehouse contrary to 1878, s. 35. Penalty—fine not exceeding £1 for first, and £5 for every subsequent offence.

Letting, suffering to be occupied, or occupying any place as a bakehouse in contravention of 1883, s. 15. Penalty—fine not exceeding £3, and, on a second or any subsequent conviction, not exceeding £5. The Court may, in addition to or instead of inflicting this fine, order means to be adopted for removing the ground of complaint. If after expiration of the time mentioned, or as enlarged on application, the order is not complied with, the occupier is liable to a fine not exceeding £1 per day during non-compliance.

Carrying on a white-lead factory without a certificate. Penalty—fine not exceeding £2 per day (1883, s. 6).

Giving out work to be done in a place injurious to health after one month from receipt of inspector's notice. Penalty—fine not exceeding £10 (1895, s. 5).

Causing or allowing wearing apparel to be made in a place where there is infectious disease. Penalty—fine not exceeding £10 (1895, s. 6).

Contravention of an order of Court *re* dangerous factory or workshop. Penalty—fine not exceeding £2 per day (1895, s. 2).

Contravention of an order of Court *re* dangerous machine. Same penalty (1895, s. 4).

Contravention of an order of Court *re* means of escape in case of fire. Penalty—fine not exceeding £1 per day (1891, s. 7 (2)).

Contravention of an order of Court *re* moveable fire-escapes. Penalty—fine not exceeding £2 per day (1895, s. 10).



Contravention of any special rule established for a factory or workshop. Penalty—fine not exceeding £2. The occupier is also liable to a fine not exceeding £10, unless he proves that he had taken all reasonable means to prevent it (1891, s. 9 (1)).

Failure on the part of the occupier to comply with any provision of 1891, s. 11, *re* publication of special rules. Penalty—fine not exceeding £10.

Pulling down, injuring, or defacing any special rules when posted up, or any notice posted up in pursuance of any special rules. Penalty—fine not exceeding £5 (1891, s. 11).

Failure on the part of the occupier to fix holidays as required. Penalty—fine not exceeding £5 (1878, s. 22).

Failure to give notice on beginning to occupy a factory or workshop. Penalty—fine not exceeding £5 (1878, s. 75; 1891, s. 26).

Contravention of 1878, s. 78, *re* affixing of notices. Penalty—fine not exceeding £2.

Failure to affix notice of particulars respecting employment in accordance with 1878, s. 66: and 1891, s. 14 (2). Penalty—fine not exceeding £5.

Failure to send notice with respect to an accident. Same penalty (1895, s. 18).

Failure of an employer to report an accident to the occupier. Same penalty (1895, s. 18).

Failure on the part of a medical practitioner to notify a case of lead poisoning, etc. Penalty—fine not exceeding £2 (1895, s. 29).

Non-compliance with requirements *re* register of accidents. Penalty—fine not exceeding £10 (1895, s. 20).

Failure to make annual return of persons employed. Penalty—fine not exceeding £10 (1895, s. 34).

Failure to send list of outworkers. Penalty—fine not exceeding £2 (1891, s. 27; 1895, s. 42).

Contravention of 1878, s. 77, *re* registers. Penalty—fine not exceeding £2.

Wilfully making a false entry in any register, etc., or a false declaration, or knowingly making use thereof. Penalty—fine not exceeding £20, or imprisonment not exceeding three months with or without hard labour (1878, s. 85).

Failure to comply with 1895, s. 40, with respect to particulars for piece-work, fraudulently using a false indicator or altering an automatic indicator. Penalty—fine not more than £10, and, in case of a second or subsequent conviction within two years from the last, not less than £1.

Disclosing, on the part of a worker in a factory or workshop, particulars respecting wages or work for the purpose of divulging a trade secret. Penalty—fine not exceeding £10 (1895, s. 40 (3)).

Soliciting or procuring any person engaged as a worker in a factory to disclose such particulars, or rewarding him with that object. Same penalty (1895, s. 40 (4)).

Obstructing an inspector in the execution of his duties. Penalty—fine not exceeding £5. If he is obstructed in a factory or workshop, the occupier is liable to a fine not exceeding £5, or, where the offence was committed at night, £20: and if in a domestic factory or workshop, £1, or where the offence was committed at night, £5. In case of a second or subsequent conviction in relation to a factory within two years from the last, the fine is to be not less than £1 for each offence. This offence includes wilfully delaying an inspector, failing to comply with a requisition by him, or to produce any document, preventing or attempting to prevent a child, young person, or woman from appearing or being examined by him;

but no one is required to answer a question or give any evidence tending to criminate himself (1878, s. 68 ; 1891, s. 28).

Forging, etc., an inspector's certificate, or falsely pretending to be an inspector. Penalty—imprisonment not exceeding three months with or without hard labour (1878, s. 70).

Forging, etc., any other certificate, or making use of a certificate as applying to any person which does not so apply, or personating any person named in a certificate, or conniving at any of these things. Penalty—fine not exceeding £20, or imprisonment not exceeding three months with or without hard labour (1878, s. 85).

In the case of a contravention of or non-compliance with any of the provisions of the Cotton Cloth Factories Act, the inspector is to give notice in writing to the occupier of the acts or omissions. If any of these are continued, or not remedied, or repeated within twelve months after the notice, the occupier is liable for the first offence to a penalty of not less than £5 nor more than £10, and for every subsequent offence to a penalty of not less than £10 nor more than £20 (1889, s. 13).

#### DEFINITIONS, ETC.

“Child” means a person under the age of fourteen years (1878, s. 96).

“Young person” means a person of the age of fourteen years and under the age of eighteen years ; or a child of the age of thirteen years who has obtained an educational certificate in accordance with the Acts (1878, ss. 26, 96).

“Woman” means a woman of eighteen years of age and upwards (1878, s. 96).

“Parent” means a parent or guardian of, or person having the legal custody of, or the control over, or having direct benefit from, the wages of a child or young person.

“Person” includes a body of persons corporate or unincorporate (1878, s. 96).

“Sanitary Authority” and “Local Authority” mean the local authority under the Public Health (Scotland) Act, 1867.

“Medical Officer of Health” means the medical officer under the Public Health (Scotland) Act, 1867, or, where no such officer has been appointed the medical officer appointed by the parish council.

“Poor-law Medical Officer” means the medical officer appointed by the parish council.

“Court of Summary Jurisdiction” means the Sheriff of the county or any of his substitutes.

“County Court” means the Sheriff Court (1878, s. 105).

“Week” means the period between midnight on Saturday night and midnight on the succeeding Saturday night.

“Night” means the period between nine o'clock in the evening and six o'clock in the succeeding morning.

“Prescribed” means prescribed for the time being by a Secretary of State (1878, s. 96).

“Machinery” includes any driving strap or band.

“Process” includes the use of any locomotive (1891, s. 37 (1)).

“Mill-gearing” comprehends every shaft, whether upright, oblique, or horizontal, and every wheel, drum, or pulley by which the motion of the first moving power is communicated to any machine appertaining to a manufacturing process (1878, s. 96).

“Textile Factory” means any premises wherein or within the close or curtilage of which steam, water, or other mechanical power is used to move or work any machinery employed in preparing, manufacturing, or finishing, or in any process incident to the manufacture of cotton, wool, hair, silk, flax, hemp, jute, tow, china-grass, cocoa-nut fibre, or other like material, either separately or mixed together, or mixed with any other material, or any fabric made thereof: provided that print works, bleaching and dyeing works, lace warehouses, paper mills, flax scutch mills, rope works, and hat works are not deemed to be textile factories.

“Non-Textile Factory” means (1) any works, warehouses, furnaces, mills, foundries, or places named in part i. of the fourth schedule to the Act of 1878; (2) also any premises or places named in part ii. of the said schedule wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there; (3) also any premises wherein or within the close or curtilage or precincts of which any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes or any of them: that is to say—(a) in or incidental to the making of any article, or part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and wherein or within the close or curtilage or precincts of which steam, water, or other mechanical power is used in aid of the manufacturing process carried on there.

“Factory” means textile factory and non-textile factory, or either of such descriptions of factories.

“Workshop” means (1) any premises or places named in part ii. of the fourth schedule to the Act of 1878 which are not a factory within the meaning of the Acts; (2) also any premises, room, or place, not being a factory within the meaning of the Acts, in which premises, room, or place, or within the close or curtilage or precincts of which premises any manual labour is exercised by way of trade, or for purposes of gain in or incidental to the following purposes, or any of them, that is to say—(a) in or incidental to the making of any article or part of any article, or (b) in or incidental to the altering, repairing, ornamenting, or finishing of any article, or (c) in or incidental to the adapting for sale of any article, and to which or over which premises, room, or place the employer of the persons working therein has the right of access or control. The Acts do not apply to such workshops, other than bakehouses, as are conducted on the system of not employing any child, young person, or woman therein, except in the cases particularly mentioned (1878, s. 93, sch. 4).

“White-lead Factory” includes every factory and workshop in which the manufacture of white-lead is carried on (1883, s. 18).

“Bakehouses” are workshops unless they become factories by reason of the use of steam, water, or other mechanical power (1878, s. 93, sch. 4, pt. ii. (22)).

Retail Bakehouse” means any bakehouse or place, the bread, biscuits, or confectionery baked in which are not sold wholesale, but by retail in some shop or place occupied together with such bakehouse, but does not include any place which is a factory within the meaning of the Acts (1883, s. 18; 1891, s. 36). The words “occupied together with” in this definition signify a business connection, not a geographical limit (*Glasgow Local Authority*, 1896, 4 S. L. T. 210).

“Domestic Workshop” means a workshop where persons are employed at home, that is to say, in a private house, room, or place which, though



used as a dwelling, is, by reason of the work carried on there, a factory or workshop within the meaning of the Acts, and in which neither steam, water, nor other mechanical power is used in aid of the manufacturing process carried on there, and in which the only persons employed are members of the same family dwelling there (1878, s. 16; 1891, s. 37 (2)). Domestic factories are not separately defined.

"Laundries" are classed as factories or workshops according as steam, water, or other mechanical power is used in aid of the laundry process or not; but every laundry is excluded in which the only persons employed are (a) inmates of any prison, reformatory, or industrial school, or other institution for the time being subject to inspection under any Act other than the Factory Acts; (b) inmates of any institution conducted in good faith for religious or charitable purposes; or (c) members of the same family dwelling there, or in which not more than two persons dwelling elsewhere are employed (1895, s. 22).

"Dock, Wharf, Quay, and Warehouse" includes, so far as relates to the process of loading or unloading therefrom or thereto, all machinery and plant used in that process, and "Building in course of construction" means any premises on which machinery worked by steam, water, or other mechanical power is temporarily used for the purpose of the construction of a building or any structural work in connection with a building. The provisions relating to them have effect as if they were included in the word factory. The purpose for which the machinery is used is deemed to be a manufacturing process. The person who by himself, his agents or workmen, temporarily uses any such machinery for the before-mentioned purpose, is the occupier of the said premises, and the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same, or forming part thereof, and the person so using any such machinery, is deemed, in respect to the provisions relating thereto, to be the occupier of a factory (1895, s. 23).

"Tenement Factory" means a building where mechanical power is supplied to different parts of the same building occupied by different persons, for the purpose of any manufacturing process or handicraft, in such manner that those parts constitute, in law, separate factories. All buildings situate within the same close or curtilage are treated as one building (1895, s. 24 (1) (6)).

"Cotton-cloth Factory" means any room, shed or workshop, or any part thereof, in which the weaving of cotton cloth is carried on (1889, s. 4).

"Employment" and "Working for Hire."—A child, young person, or woman who works in a factory or workshop, whether for wages or not, either in a manufacturing process or handicraft, or in cleaning any part of the factory or workshop used for any manufacturing process or handicraft, or in cleaning or oiling any part of the machinery, or in any other kind of work whatsoever incidental to or connected with the manufacturing process or handicraft, or connected with the article made or otherwise the subject of the manufacturing process or handicraft therein, is, save as is otherwise provided by the Acts, deemed to be employed therein. For the purposes of the Acts, an apprentice is deemed to work for hire (1878, s. 94: *Robinson*, 1890, 17 R. (J. C.) 62, 2 White, 511).

"Artificial raising of temperature" and "artificial production of humidity" include raising of temperature and production of humidity by any artificial means whatsoever, except by gas when used for lighting purposes only (1889, s. 4.)

A part of a factory or workshop may be taken to be a separate factory

or workshop, and a room solely used for the purpose of sleeping therein is not deemed to form part of the factory or workshop, (1878, s. 93; 1891, s. 31). The Secretary of State may by order direct, with respect to any class of factories or workshops, that different branches or departments of work carried on in the same factory or workshop shall, for all or any of the purposes of the Acts, be treated as different factories or workshops (1895, s. 39). An order in accordance with this provision was gazetted 14 February 1896 (L. G. 859). Where a place situate within the precincts forming a factory or workshop is solely used for some other purpose than the manufacturing process or handicraft carried on there, it is not deemed to form part of the factory or workshop, but is deemed a separate factory or workshop if it would otherwise be one. Any premises or place is not excluded from the definition of a factory or workshop by reason only of being in the open air (1878, s. 93).

The exercise of manual labour by a child or young person in a recognised efficient school during a portion of the school hours, for purposes of instruction, is not an exercise of manual labour for the purpose of gain (1878, s. 93). A private house or private room is not constituted a workshop by reason that any of the family dwelling there does manual labour by way of trade or for purposes of gain in or incidental to any of the handicrafts specified in the fifth schedule to the Act of 1878, or any other to which a Secretary of State may extend this provision: or does manual labour for purposes of gain in or incidental to some of the purposes mentioned in that Act in that behalf, where the labour is exercised at irregular intervals and does not furnish the whole or principal means of living to the family (1878, ss. 97, 98; *Beadon*, 1871, L. R. 6 Q. B. 718). Where in a factory the owner or hirer of a machine or implement moved by mechanical power, in connection with which children, young persons, or women are employed, is some person other than the occupier of the factory, and the children, etc., are in the employment and pay of the owner or hirer of the machine or implement, he is deemed to be the occupier so far as respects any offence under the Acts in relation to such children, etc. (1878, s. 99).

#### EXEMPTIONS AND MISCELLANEOUS PROVISIONS.

Nothing in the Acts extends (1) to any young person, being a mechanic, artisan, or labourer working only in repairing either the machinery in or any part of a factory or workshop; (2) to the process of gutting, salting, or packing fish immediately upon its arrival in the fishing-boats; or (3) to the process of cleaning and preparing fruit, so far as is necessary to prevent the spoiling of the fruit at its arrival at a factory or workshop during the months of June, July, August, and September (1878, s. 100; 1891, s. 32).

*Orders by the Secretary of State*, where no other procedure is indicated, are published in the *London Gazette*, or, if they relate exclusively to Scotland, in the *Edinburgh Gazette*, and also in such manner as the Secretary of State thinks best adapted for the information of all persons interested. They come into operation at the date when they are gazetted. They may be temporary or permanent, conditional or unconditional, and may effect anything competent, either wholly or partly. The order must be laid before both Houses of Parliament, and either House may, within forty days thereafter, resolve that it be annulled. While an order is in force, it applies as if it formed part of the Acts (1878, ss. 65, 105; 1895, s. 47).

## SCHEDULES (1878).

## FIRST SCHEDULE (s. 38).

## SPECIAL PROVISIONS FOR HEALTH.

*Factories and Workshops in which the Employment of Young Persons and Children is restricted.*

1. In a part of a factory or workshop in which there is carried on the process of silvering of mirrors by the mercurial process, or the process of making white-lead, a young person or child shall not be employed.

2. In the part of a factory in which the process of melting or annealing glass is carried on, a child or female young person shall not be employed.

3. In a factory or workshop in which there is carried on—

(a) the making or finishing of bricks or tiles not being ornamental tiles; or

(b) the making or finishing of salt,  
a girl under the age of sixteen years shall not be employed.

4. In a part of a factory or workshop in which there is carried on—

(a) Any dry grinding in the metal trade, or

(b) the dipping of lucifer matches,  
a child shall not be employed.

5. In any grinding in the metal trades other than dry grinding, or in fustian-cutting, a child under the age of eleven years shall not be employed.

## SECOND SCHEDULE, AS AMENDED (s. 39).

## SPECIAL RESTRICTIONS.

*Places forbidden for Meals.*

The prohibition on a child, young person, or woman taking a meal or remaining during the times allowed for meals in certain parts of factories or workshops applies to the parts of factories and workshops following; that is to say—

- (1) In the case of glass works, to any part in which the materials are mixed; and (2) in the case of glass works where flint glass is made, to any part in which the work of grinding, cutting, or polishing is carried on; and (3) in the case of lucifer-match works, to any part in which any manufacturing process or handicraft (except that of cutting the wood) is usually carried on; and (4) in the case of earthenware works, to any part known or used as dippers house, dippers drying room, or china scouring room; and (5) every part of a factory or workshop in which part wool or hair is sorted or dusted, or in which rags are sorted, dusted, or ground; and (6) every part of a textile factory in which part gassing is carried on; and (7) every part of a print work, bleach work, or dye work in which part singeing is carried on; and (8) every part of a factory or workshop in which part any of the following processes are carried on:—grinding, glazing, or polishing on a wheel, brass-casting, type-founding, dipping metal in aquafortis or other acid solution, metal-bronzing, majolica painting on earthenware, catgut cleaning and repairing, cutting,



turning, polishing bone, ivory, pearlshell, snailshell; and (9) every factory or workshop in which chemicals or artificial manures are manufactured, except any room used solely for meals; and (10) every factory or workshop in which white-lead is manufactured, except any room thereof used solely for meals; and (11) every part of a factory or workshop in which part dry powder or dust is used in any of the following processes:—lithographic printing, playing-card making, fancy-box making, paper staining, almanac making, artificial-flower making, paper colouring and enamelling, colour making.

### THIRD SCHEDULE.

#### SPECIAL EXCEPTIONS.

##### PART TWO AS AMENDED (s. 52).

##### *Meal Hours.*

The cases in which the provisions of this Act as to meal-times being allowed at the same hour of the day are not to apply, are—

- (1) The case of children, young persons, and women employed in the following factories; that is to say—blast furnaces, iron mills, paper mills, glass works, and letterpress-printing works; and
- (2) the case of male young persons employed in that part of any print works or bleaching and dyeing works in which the process of dyeing or open-air bleaching is carried on.

The cases in which and the extent to which the provisions of this Act as to a child, young person, or woman during the times allowed for meals being employed, or being allowed to remain in a room in which a manufacturing process or handicraft is being carried on, are not to apply, are—

- (1) The case of children, young persons, and women employed in the following factories; that is to say—iron mills, paper mills, glass works (save as otherwise provided by this Act), and letterpress-printing works; and
- (2) the case of a male young person employed in that part of any print works or bleaching and dyeing works in which the process of dyeing or open-air bleaching is carried on, to this extent, that the said provisions shall not prevent him, during the times allowed for meals to any other young person or to any child or woman, from being employed or being allowed to remain in any room in which any manufacturing process is carried on, and shall not prevent, during the times allowed for meals to such male young person, any other young person or any child or woman from being employed in the factory or allowed to remain in any room in which any manufacturing process is carried on.

This exception has been extended to (a) textile factories wherein female young persons or women employed in a distinct department in which there is no machinery commence work at a later hour than the men and other young persons, subject to the condition that all in the same department shall have their meals at the same time; (b) non-textile factories and workshops wherein is carried on the making of wearing apparel; (c) non-textile factories and workshops wherein there are two or more departments or sets of young persons, subject to the condition that all in the same department

or set shall have their meals at the same time; (*d*) non-textile factories where the making of bread and biscuits by travelling ovens is carried on.

## PART THREE, AS AMENDED (s. 53).

*Overtime.*

The exception with respect to the employment of young persons and women for forty-eight days in any twelve months during a period of employment, beginning at six or seven o'clock in the morning and ending at eight or nine o'clock in the evening, or beginning at eight o'clock in the morning and ending at ten o'clock in the evening, applies to each of the non-textile (1895, s. 37 (2)) factories and workshops, and parts thereof, following; that is to say—

- (1) Where the material which is the subject of the manufacturing process or handicraft is liable to be spoiled by weather; namely, (*a*) flax scutch mills; and (*b*) a factory or workshop, or part thereof, in which is carried on the making or finishing of bricks or tiles not being ornamental tiles; and (*c*) the part of rope works in which is carried on the open-air process; and (*d*) the part of bleaching and dyeing works in which is carried on open-air bleaching or turkey-red dyeing; and (*e*) a factory or workshop, or part thereof, in which is carried on glue making; and
- (2) Where press of work arises at certain recurring seasons of the year: namely, (*f*) letterpress-printing works; (*g*) bookbinding works; and a factory, workshop, or part thereof, in which is carried on the manufacturing process or handicraft of (*h*) lithographic printing; or (*i*) machine ruling; or (*k*) firewood cutting; or (*l*) bon-bon and Christmas-present making; or (*m*) almanac making; or (*n*) valentine making; or (*o*) envelope making; or (*p*) aerated-water making; or (*q*) playing-card making; and
- (3) Where the business is liable to sudden press of orders arising from unforeseen events; namely, a factory or workshop, or part thereof, in which is carried on the manufacturing process or handicraft of: (*r*) the making up of any article of wearing apparel; or (*s*) the making up of furniture hangings; or (*t*) artificial-flower making; or (*u*) fancy-box making; or (*x*) biscuit making; or (*v*) job dyeing; (*x*) the said exception applies also to any part of a factory (whether textile or non-textile) or workshop which is a warehouse not used for any manufacturing process or handicraft, and in which persons are solely employed in polishing, cleaning, wrapping, or packing up goods (1895, s. 37 (2)). Provided that the said exception shall not apply—(*a*) where persons are employed at home, that is to say, to a private house, room, or place which, though used as a dwelling, is by reason of the work carried on there a factory or workshop within the meaning of this Act, and in which neither steam, water, nor other mechanical power is used, and in which the only persons employed are members of the same family dwelling there; or (*b*) to a workshop, or part thereof, which is conducted on the system of not employing any child or young person therein.

This exception has been extended to die sinking, cardboard making, paper colouring and enamelling, rolling of tea-lead: the making of gas-holders, boilers, and other apparatus partly manufactured in the open air;

non-textile factories in which the only processes carried on are the processes of calendering, finishing, hooking, lapping, or making up and packing of any yarn or cloth, or any of such processes; the processes carried on in non-textile factories of calendering, etc., any yarn or cloth, or any such processes, and none other; non-textile factories and workshops wherein the manufacture of fire-works is carried on; the making of pork pies; the processes of warping, winding, or filling, or either of them, as incidental to the weaving of ribbons in workshops; to male young persons employed in pattern-card making; milling, perforating, and gumming postage and inland revenue stamps; non-textile factories in which are carried on the occupations of preparing cream and making butter and cheese.

#### PART FOUR, AS AMENDED (s. 54).

##### *Additional Half Hour.*

The exception with respect to the employment of a child, young person, or woman for a further period of thirty minutes, where the process is in an incomplete state, applies to the factories following; that is to say—(a) bleaching and dyeing works; (b) print works; (c) iron mills in which male young persons are not employed during any part of the night; (d) foundries in which male young persons are not employed during any part of the night; and (e) paper mills in which male young persons are not employed during any part of the night; and (f) non-textile factories, workshops, or parts thereof, in which is carried on the process of baking of bread or biscuits.

#### PART FIVE, AS AMENDED (s. 56).

##### *Overtime for Perishable Articles.*

The exception with respect to the employment of women for ninety-six days in any twelve months, during a period of employment beginning at six or seven o'clock in the morning and ending at eight or nine o'clock in the evening, applies to a factory or workshop, or part thereof, in which any of the following processes is carried on: namely—

The process of making preserves from fruit,

The process of preserving or curing fish, or

The process of making condensed milk.

Non-textile factories in which are carried on the occupations of preparing cream and making butter and cheese.

#### PART SIX, AS AMENDED (s. 58).

##### *Night Work.*

The exception with respect to the employment of male young persons during the night applies to the factories following; that is to say—(a) blast furnaces, (b) iron mills, (c) letterpress - printing works, and (d) paper mills.

This exception has been extended, as far as regards male young persons of at least sixteen years of age, to oil-seed crushing mills; copper and yellow-metal rolling mills; iron and metal tube works in which the furnaces used are Siemens gas furnaces; the knocking out and cutting departments of non-textile factories engaged in the refining of loaf-sugar; the galvanizing of metal in non-textile factories, iron and metal tube works in which furnaces are used; china-clay works; and classes of non-textile factories where is carried on the process of iron-ore washing.



## PART SEVEN, AS AMENDED (s. 48).

*Spell.*

The exception respecting the continuous employment in certain textile factories during the winter months of children, young persons, and women without an interval of at least half an hour for a meal for the same period as in a non-textile factory, applies to textile factories solely used for (a) the making of elastic web, or (b) the making of ribbon, or (c) the making of trimming, or (d) the winding and throwing of raw silks or either of those processes; also hosiery factories.

## FOURTH SCHEDULE, AS AMENDED (ss. 93, 96).

## LIST OF FACTORIES AND WORKSHOPS.

## PART ONE.

*Non-Textile Factories.*

(1) "Print works," that is to say, any premises in which any persons are employed to print figures, patterns, or designs upon any cotton, linen, woollen, worsted, or silken yarn, or upon any woven or felted fabric not being paper.

(2) "Bleaching and dyeing works," that is to say, any premises in which the processes of bleaching, beetling, dyeing, calendering, finishing, hooking, lapping, and making up and packing any yarn or cloth of any material, or the dressing or finishing of lace, or any one or more of such processes, or any process incidental thereto, are or is carried on. ("Finishing" means the finishing which is incidental to the operation of bleaching or dyeing (*Howarth*, 1862, 31 L. J. M. C. 262)).

(3) "Earthenware works," that is to say, any place in which persons work for hire in making or assisting in making, finishing or assisting in finishing, earthenware or china (1891, s. 38) of any description, except bricks and tiles not being ornamental tiles.

(4) "Lucifer-match works," that is to say, any place in which persons work for hire in making lucifer matches, or in mixing the chemical materials for making them, or in any process incidental to making lucifer matches, except the cutting of the wood.

(5) "Percussion-cap works," that is to say, any place in which persons work for hire in making percussion caps, or in mixing or storing the chemical materials for making them, or in any process incidental to making percussion caps.

(6) "Cartridge works," that is to say, any place in which persons work for hire in making cartridges, or in any process incidental to making cartridges, except the manufacture of the paper or other material that is used in making the cases of the cartridges.

(7) "Paper-staining works," that is to say, any place in which persons work for hire in printing a pattern in colours upon sheets of paper, either by blocks applied by hand, or by rollers worked by steam, water, or other mechanical power.

(8) "Fustian-cutting works," that is to say, any place in which persons work for hire in fustian cutting.

(9) "Blast furnaces," that is to say, any blast furnace or other furnace or premises in or on which the process of smelting or otherwise obtaining any metal from the ores is carried on.

(10) "Copper mills."

(11) "Iron mills," that is to say, any mill, forge, or other premises in or on which any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel.

(12) "Foundries," that is to say, iron foundries, copper foundries, brass foundries, and other premises or places in which the process of founding or casting any metal is carried on; except any premises or places in which such process is carried on by not more than five persons, and as subsidiary to the repair or completion of some other work.

(13) "Metal and india-rubber works," that is to say, any premises in which steam, water, or other mechanical power is used for moving machinery employed in the manufacture of machinery, or in the manufacture of any article of metal not being machinery, or in the manufacture of india-rubber or gutta-percha, or of articles made wholly or partially of india-rubber or gutta-percha.

(14) "Paper mills," that is to say, any premises in which the manufacture of paper is carried on (*Coles*, 1864, 10 L. T. N. S. 616).

(15) "Glass works," that is to say, any premises in which the manufacture of glass is carried on.

(16) "Tobacco factories," that is to say, any premises in which the manufacture of tobacco is carried on.

(17) "Letterpress-printing works," that is to say, any premises in which the process of letterpress-printing is carried on.

(18) "Bookbinding works," that is to say, any premises in which the process of bookbinding is carried on.

(19) Flax scutch mills.

## PART TWO.

### *Non-Textile Factories and Workshops.*

(20) "Hat works," that is to say, any premises in which the manufacture of hats or any process incidental to their manufacture is carried on.

(21) "Rope works," that is to say, any premises being a ropery, rope walk, or rope work, in which is carried on the laying or twisting or other process of preparing or finishing the lines, twines, cords, or ropes, and in which machinery moved by steam, water, or other mechanical power is not used for drawing or spinning the fibres of flax hemp, jute, or tow, and which has no internal communication with any buildings or premises joining or forming part of a textile factory, except such communication as is necessary for the transmission of power.

(22) "Bakehouses," that is to say, any places in which are baked bread, biscuits, or confectionery, from the baking or selling of which a profit is derived. (*See Definitions, etc.*)

(23) "Lace warehouses," that is to say, any premises, room, or place not included in bleaching and dyeing works as hereinbefore defined, in which persons are employed upon any manufacturing process or handicraft in relation to lace, subsequent to the making of lace upon a lace machine moved by steam, water, or other mechanical power.

(24) "Shipbuilding yards," that is to say, any premises in which any ships, boats, or vessels used in navigation are made, finished, or repaired.

(25) "Quarries," that is to say, any place, not being a mine, in which persons work in getting slate, stone, coprolites, or other minerals. (All quarries, any part of which is more than twenty feet deep, are now put

under the inspectors under the Metalliferous Mines Regulation Acts, 1872 and 1875 (Quarries Act, 1894, ss. 1, 3)).

(26) "Pit banks," that is to say, any place above ground adjacent to a shaft of a mine, in which place the employment of women is not regulated by the Coal Mines Regulation Act, 1872, or the Metalliferous Mines Regulation Act, 1872, whether such place does or does not form part of the mine within the meaning of those Acts.

#### FIFTH SCHEDULE (s. 97).

##### SPECIAL EXEMPTIONS.

Straw Plaiting.      Pillow-lace Making.      Glove Making.

**Factum præstandum.**—See OBLIGATION; DECREE; DEBTORS (SCOTLAND) ACT, 1880; IMPRISONMENT FOR DEBT.

**Faculty.**—See POWER; TRUST.

**Fairs and Markets.**—The right of holding fairs was in ancient times granted by the sovereign, and there are many instances in which such rights have been granted to burghs and private persons. The privilege of fairs was that no goods brought to them could be attached or person arrested on them for anterior debts, but only for crimes committed or debts contracted during the fair (*Gibson*, 1552, Mor. 4145). By Statutes 1535, c. 26; 1540, c. 98; and 1579, c. 26, forestalling (*i.e.* buying merchandise coming to the market before it is presented there) or regrating (*i.e.* buying goods in the market and reselling the same within four miles thereof) were prohibited and made severely punishable. These Acts have long been in desuetude.

By the law of Scotland, differing in the points from the English law, stolen property sold at a fair might be recovered by the true owner (*Bishop of Caithness*, 1629, Mor. 4145). The person to whom a right of fair had been granted was allowed to levy tolls or customs, but only to the extent authorised by his grant or by immemorial custom.

In addition to grants by the sovereign, many Acts of Parliament were passed during the sixteenth century, conferring the right of holding markets and granting power to collect tolls and customs. Any right of fair granted was subject to other rights of the same nature which had been previously conferred, and which could not be restricted (*Falconer*, 1642, Mor. 4146). In another case, a grant was given by the Crown to a burgh of the sole right of holding fairs within a radius of two miles of the town. It was held that the right so given had denuded the sovereign of all power to authorise other markets within the boundary (*Magistrates of Stirling*, 1706, Mor. 4148). There are numerous Acts of the Scots Parliaments dealing with fairs: 1456, c. 9; 1503, c. 36; 1581, c. 5. These Acts prohibited fairs being held on Sundays or in kirks, and appointed censors to imprison profane swearers at fairs.

Fairs and markets are now regulated by the Markets and Fairs Clauses Act, 1847, 10 & 11 Viet. c. 14. The provisions of the Act are very numerous, and deal with the construction of markets, erection of slaughter-houses,



weighing of goods and carts, tolls, and bye-laws. By the Markets and Fairs (Weighing of Cattle) Act, 1887, 50 & 51 Viet. c. 27, it was enacted that, at or near all fairs or markets, accommodation should be provided for weighing cattle, and that either a buyer or seller should have the right to have cattle weighed. The Secretary for Scotland had power to exempt any market in Scotland from the provisions of the Act, but by 54 & 55 Viet. c. 70 the powers vested in him were transferred to the Board of Agriculture. The last-mentioned Act, The Markets and Fairs (Weighing of Cattle) Act, 1891, provided for a return by the market authorities of certain markets, to the Board of Agriculture, of the number of cattle entering the market, the weight of the cattle weighed and the prices obtained for cattle sold. A schedule to the Act gives five markets in Scotland the authorities of which are called on to make a return, namely, Aberdeen, Dundee, Edinburgh, Glasgow, and Perth; but the Act gives power to the Board of Agriculture to increase the number. Auctioneers are required to provide at their marts facilities for weighing cattle.

By sec. 277 of the Burgh Police (Scotland) Act, 1892, 55 & 56 Viet. c. 55, wide powers are granted to the Commissioners as to markets and market-places. They may establish new markets, provided they do not interfere with the existing rights and privileges of any person. The power to levy tolls cannot be exercised till the tolls proposed have been approved by the Sheriff.

The rights of the public in markets and market-places were considered in two recent cases. The magistrates of Edinburgh were held not entitled to exclude the public from a market-place for three weeks, and assign part of a public street for the purposes of the market (*Blackie*, 1884, 11 R. 783; 13 R. (H. L.) 78; see also *Murray*, 1893, 20 R. 908).

[Bell, *Prin.* 664; Ersk. i. 4. 29; Bankt. i. 19. 12-15; Kames, *Statute Law*, under heading "Fairs."]

See ENGROSSER; FORESTALLING; REGRATING.

**Falcidia portio.**—An heir who was directed to pay away nearly the whole estate in legacies, would be likely to refuse to enter on the inheritance, and incur the liabilities of an heir without the prospect of substantial advantage to himself. The result of his refusal would be that the testament would fail; and the legatees would receive none of the benefits intended for them. In these circumstances, it was advisable, in the interests of all the parties concerned, that some substantial inducement should be held out to the heir to induce him to enter. Various statutes were passed with this purpose, but the object aimed at was not effectually secured till the *Lex Falcidia* was passed in 40 B.C. The terms of the *lex* are set forth in *Dig.* 35. 2. 1. pr. It enacted that no testator should leave in legacies more than three-fourths of his estate, so that the remaining fourth should be secured for the heir, free of legacies. This fourth is the *Falcidia portio* or *Falcidia quarta*. If the aggregate value of the legacies charged on the heir exceeds three-fourths of the inheritance, all the legacies suffer a proportional abatement, so that one clear fourth remains for the heir. In the first instance, the *Lex Falcidia* applied only to legacies. The S.C. Pegasianum (75 A.D.) subsequently extended it to *fiduci commissæ* (*Inst.* ii. 23. 5); and finally, in the time of Septimius Severus, it was extended to donations *mortis causa* (*D.* 24. 1. 32. 1; 31. 77. 1). The inheritance is valued as at the testator's death. The testator's debts and funeral expenses, the expenses of administration, and

certain other charges, are deducted. Three-fourths of what remains is then set apart for the legatees; and, under no circumstances, can they ever demand more. The rest goes to the heir, who profits by any increase, and loses by any decrease, in the estate, which occurs before his entry. Nothing that the heir might have got from the testator by legacy, *jidi commissum*, or donation *mortis causa*, was included in it, unless the testator so directed (*D.* 35. 2. 29). Justinian, by Nov. 1. 2. 2, enabled the testator, by express declaration, to deprive the heir of the *Fulcidia portio*. The right to deduct the portio did not exist in the case of certain kinds of legacies, *e.g.* those for pious purposes, or those which went to make up the *legitima pars*.—[*Inst.* ii. 22; *Gaius*, ii. 224–228; *D.* 35. 2; *Cod.* 6. 50; *Stair*, iii. 8. 12. 13. 14.]

**Fallow.**—See CROPPING.

**Falsa demonstratio non nocet.**—An erroneous description, of a person or a subject, does not injure. Thus a legacy is valid, although there may be an error in naming or describing the legatee—*dummodo constet de persona*, provided it be evident, from the whole circumstances, who is the individual meant. For example, in *Macfarlane's Trs.* (1878, 6 R. 288) a legacy in favour of “my late brother James’ son” was, in the circumstances of the case, held effectual to the only child of James, who was a daughter. A testator left a legacy to his niece E., and “to each of the other three” children of his brother J. £2000. J., however, left four children other than E.; and it was held that the legacy was effectual to the whole four other children of J. (*Bryce's Tr.*, 1878, 5 R. 722. See also *Millar's Trs.*, 1891, 18 R. 989; *Lord Lorat*, 1884, 11 R. 1119; *Keiller*, 1824, 3 S. 396, O. E. 279; *Scottish Missionary Society*, 1858, 20 D. 634). Similarly, if there be a wrong description of the subject bequeathed, this does not void the bequest, provided there is no doubt as to the thing intended to be specified (*Bryce's Trs.*, 1875, 2 R. 775; *Wright's Trs.*, 1870, 8 M. 708).

[*McLaren, Wills and Succession*, i. 336 *et seq.*; *Craigie, Conveyancing (Mov.)*, 2nd ed., 534; *Trayner, Latin Maxims*.]

**False Claims in Bankruptcy.**—By the Bankruptcy (Scotland) Act, 1856 (19 & 20 Vict. c. 79), s. 178, it is enacted that: “If any person shall be guilty of wilful falsehood in any oath made in pursuance of this Act, he shall be liable to a prosecution either at the instance of Her Majesty’s advocate or at the instance of the trustee with the concurrence of Her Majesty’s Advocate, provided that in the latter case the prosecution shall be authorised by a majority of the creditors present at a meeting to be called for the purpose; and such person shall, on conviction, besides the awarded punishment, forfeit to the trustee, for behoof of the creditors, his whole right claim and interest in or upon the sequestered estate, and the same shall be distributed, either under the sequestration, or, if it be closed, under a process of multiplepoinding, as is hereinbefore provided.”

By the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), s. 14, it is provided: “If any creditor under any petition for sequestration or cessio, or disposition *omnium bonorum*, wilfully, and with intent to defraud, makes any false claim, or makes or tenders any proof, affidavit, declaration, or statement of account which is untrue in any material particular, he shall be

deemed guilty of a crime and offence, and on conviction thereof shall be liable to be imprisoned for any time not exceeding one year, with or without hard labour."

In addition to the penalties imposed by these enactments, a debtor or creditor who is guilty of wilful falsehood in any oath taken by him is liable at common law to be prosecuted for perjury (see *Blair*, 1889, 16 R. 325, per *Ld. Pres. Inglis*; 43 & 44 Vict. c. 34 s. 16).

A bankrupt under sequestration or cessio is deemed guilty of a crime and offence, and, on conviction before the Court of Justiciary or before the Sheriff and a jury, is liable to be imprisoned for any time not exceeding two years, or by the Sheriff without a jury, for any time not exceeding sixty days, with or without hard labour, "if, knowing or believing that a false claim has been made by any person under the sequestration, he fails for the period of a month from the time of his acquiring such knowledge or belief to inform the trustee thereof" (43 & 44 Vict. c. 34, s. 13).

It is the duty of the trustee in any process of sequestration or cessio to report all offences under the Debtors Act to the presiding judge, who must on such representation, or of his own motion, direct information, in all such cases as he thinks ought to be prosecuted, to be laid before the Lord Advocate, who directs such inquiry and takes such proceedings as he thinks fit (*ib.* s. 15).

**Falsehood, Fraud, and Wilful Imposition.**—Falsehood is a generic term, and includes all those offences of which the essential characteristic is, that there is either a fraudulent imitation of the truth or a fraudulent suppression of the truth, to the prejudice of another. This general term thus includes the following offences: (1) FRAUD (*q.v.*); (2) Falsehood by Writ, which embraces (*a*) FORGERY (*q.v.*); (*b*) Falsehood, by fabricating writings where the crime does not come up to forgery; (3) Possession of bank notes or stamp forgeries or instruments; (4) Vending forged bank notes; (5) Falsehood in registering births, marriages, and deaths; (6) Bankruptcy Frauds; (7) COINING (*q.v.*).

Falsehood by writ, which does not come up to forgery, occurs when false certificates of marriages or banns are fabricated and used (*Gibson*, 1848, Ark. 489); when persons sign deeds as witnesses who were not present at the execution; when a false date is placed on a writ; when letters expressed in the third person are fraudulently fabricated; when falsified balance sheets are fraudulently used as true (*City Bank Directors*, 1879, 4 Coup. 161); when bills are vitiated, erasures or interlineations fraudulently made, or deeds or documents are mutilated or destroyed.

By the Act 17 & 18 Vict. c. 80, s. 60, it is criminal for any person, knowingly and wilfully, to make, or cause to be made, any false entry in the register of births, marriages, and deaths, or to give any false information as to the particulars which have to enter the register. The statutory penalty is penal servitude for seven years, or imprisonment for two years (see *Greig*, 1856, 2 Irv. 357; *Askew*, 1856, 2 Irv. 491; *Kinnison*, 1870, 1 Coup. 457).

The *nomen juris*, "falsehood, fraud, and wilful imposition," is used in the libel when the offence committed is what is popularly known as swindling or cheating. (See also FRAUDULENT BANKRUPTCY; FALSE CLAIMS, etc.)

**False Swearing.**—See PERJURY.



**False Weights ; False Measures.**—See WEIGHTS AND MEASURES.

**Falsifying of Books.**—By the 13th section of the Debtors (Scotland) Act, 1880 (43 & 44 Vict. c. 34), it is provided *inter alia* that a debtor in a process of sequestration or cessio shall be deemed guilty of a crime and offence if, after the presentation of the petition for sequestration or cessio, or within four months next before such presentation, “he makes or is privy to the making of any false entry in or otherwise falsifying any book, document, paper, or writing affecting or relating to his property or affairs.” On conviction before the Court of Justiciary or before the Sheriff and a jury, the debtor is liable to be imprisoned for any time not exceeding two years, or if by the Sheriff without a jury, for any time not exceeding sixty days, with or without hard labour (*ib.*).

**Familiæ erciscundæ actio.**—This was one of the divisory actions in Roman law. Any one of a number of joint-heirs could, by this action, compel a judicial division of the inheritance. In the action the judge adjusted any claims by one of the joint-heirs against the others, in respect of debts paid by him, outlay on the estate, management, etc. (Stair, i. 7. 15). Certain *res hereditariæ* were exempted from partition (*D.* 10. 2. 44. pr.).—[*Inst.* iii. 27. 4, and iv. 17. 4; Bankt. i. 8. 36; Stair, i. 7. 15.]

**Fatal Accidents Inquiries.**—I. *METHODS OF INQUIRY.*—Fatal accidents may be arranged in ten classes, according to the procedure prescribed for investigating the circumstances of each case:—

- (1) Non-industrial accidents,—boating, bathing, riding, driving, shooting, etc.; investigation by Procurator-Fiscal.
- (2) Accidents to prisoners: public inquiry by Sheriff under 40 & 41 Vict. c. 53, s. 53.
- (3) Industrial accidents; public inquiry by Sheriff and jury under 58 & 59 Vict. c. 36.
- (4) Accidents in mines and quarries: public inquiry by Home Office under 35 & 36 Vict. c. 77, 50 & 51 Vict. c. 58, and 57 & 58 Vict. c. 42.
- (5) Accidents in factories and workshops: public inquiry by Home Office under 41 Vict. c. 16, 54 & 55 Vict. c. 75, and 58 & 59 Vict. c. 37.
- (6) Accidents from explosives: public inquiry by Home Office under 38 Vict. c. 17.
- (7) Accidents in dangerous employments: public inquiry by Board of Trade under 57 & 58 Vict. c. 28, amended by 58 & 59 Vict. c. 37, s. 54.
- (8) Accidents on railways: public inquiry by Board of Trade under 34 & 35 Vict. c. 78, and 36 & 37 Vict. c. 76, s. 5.
- (9) Accidents from boiler explosions: public inquiry by Board of Trade under 45 & 46 Vict. c. 22, and 53 & 54 Vict. c. 35; and
- (10) Accidents on board ships and boats: public inquiry by Board of Trade under 57 & 58 Vict. c. 60.

This article is restricted to public inquiries in regard to fatal industrial

accidents, which are regulated by the provisions of the Fatal Accidents Inquiry (Scotland) Act, 1895.

II. *EXTENT OF THE ACT OF 1895*.—The Statute extends to and includes all cases of death of any person or persons occurring under the following circumstances:—

- (a) When the person deceased was either *employer* or *employed*;
- (b) When he was engaged in Scotland in an *industrial employment* or *occupation*, i.e. employment or occupation in the performance or superintendence of any manual labour, or in the working, management, or superintendence of machinery, appliances, or animals used in the prosecution of any work;
- (c) When his death was due, or reasonably believed to be due, to *accident*: and
- (d) When such accident occurred *in the course* of his industrial employment or occupation (58 & 59 Vict. c. 36, ss. 2 and 7).

III. *PROCEEDINGS BEFORE INQUIRY*.—Upon the occurrence of a death to which the Act extends, the Procurator-Fiscal of the county or district in which the accident has taken place proceeds to collect evidence (s. 3 (1)); presents forthwith to the Sheriff a petition craving him to hold a public inquiry (ss. 3 (1), 3 (2), and 4 (1)); furnishes to the Sheriff Clerk the names and addresses of the wife, husband, or nearest known relative, and the employer (if any) of each person killed (s. 3 (1)); and cites the necessary witnesses and havers to attend at the inquiry. The Sheriff Clerk procures the Sheriff's order directing an inquiry to be held (s. 4 (1)); and intimates the appointed time and place to—

- (a) The wife, husband, or nearest known relative of each person killed (s. 4 (2));
- (b) His employer (if any) (s. 4 (2));
- (c) The nearest consul of the country to which he belonged, if a foreigner;
- (d) The master or senior officer of his ship, if a foreign seaman; and
- (e) Any Government official or department empowered to cause a public inquiry to be held in virtue of the Statutes mentioned in Div. I., *supra*, and similar Acts of Parliament (s. 4 (2)).

He also advertises the same particulars in a newspaper circulating in the district, or, if there be more than one, in two of them (s. 4 (2)).

The Sheriff may grant warrant to secure articles for production at the inquiry; and may inspect premises, machinery, etc., with or without the jury, or grant warrant for their inspection by any named person (s. 5 (2)). The Secretary for Scotland appoints a competent person to hold the inquiry, if the Sheriff is for any sufficient cause unable to do so (s. 4 (3)). The Sheriff Clerk makes up from the Sheriff Court Jury Book a list of ten common and five special jurors, to serve on all the inquiries to be held on the same day, whom he cites in the manner provided by Statute for the citation of jurors in civil cases (s. 4 (4) and 4 (10)). See CITATION OF JURY. Employers and fellow-servants of persons killed are not competent jurors (s. 4 (6)).

IV. *PROCEEDINGS AT INQUIRY*.—The inquiry is open to the public (s. 5 (1)). The Procurator-Fiscal, or, in his necessary absence, his duly qualified depute, attends in the public interest (s. 5 (1)). The following parties may also appear at, take part in, and adduce evidence at the inquiry, either by themselves or by counsel, agents, or other persons allowed by the Sheriff, namely, (a) the wife or husband and relatives of each person killed in the accident; (b) the employer of such person; (c) H.M. Inspectors of Mines, Factories, and Workshops; (d) fellow-servants of any person killed; and (e) any other person whom the

Sheriff considers to have a just interest in the inquiry (s. 5 (3)). The Sheriff Clerk chooses by ballot, in the manner prescribed by the Court of Session Act, 1868, s. 44, a jury of five common and two special jurors (s. 4 (5)). The statutory provisions as to challenges do not apply, but any party interested in the inquiry may object to a person balloted, and if the Sheriff considers that sufficient cause has been shown, he does not allow such person to serve upon the jury (s. 4 (6)). The jurors are then sworn according to the existing statutory provisions (s. 4 (10)). The Procurator-Fiscal adduces evidence, including such medical or skilled evidence as he considers expedient, in regard to the cause or causes of the death or deaths and the circumstances of the accident (s. 5 (1)). Other parties appearing may do likewise (s. 5 (3)). The examination of any person as a witness or haver does not bar subsequent criminal proceedings against him; but no witness is compellable to answer a question tending to show that he is guilty of a crime or offence (s. 5 (4)). The evidence is taken on oath, the witnesses are subject to cross-examination, and the procedure is similar to that in a trial by the Sheriff and a jury (s. 5 (4)). The evidence is taken down in writing at length or in shorthand, as the Sheriff directs, and under his control and supervision (s. 5 (4)). At the conclusion, parties may be heard, and the Sheriff may sum up (s. 4 (7)). The jury return a verdict either unanimously or—after at least one hour's enclosure (s. 4 (8))—by a majority, setting forth, so far as the particulars have been proved: (*a*) when and where the accident took place: (*b*) when and where the death or deaths took place; and (*c*) the cause or causes of such death or deaths (s. 4 (7)). This verdict is recorded in the Sheriff Court Books (s. 5 (5)), and is not competent to be given in evidence, or to be founded on, in any subsequent judicial proceeding, civil or criminal, arising out of the same accident (s. 6). Opinions differ as to whether the jury are entitled to express an opinion ascribing fault to a named individual.

#### EXAMPLE OF VERDICT.

The jury unanimously find that David Jones within designed, at 11 o'clock in the forenoon of 2nd February 1897, in the course of his employment as an engineer in the service of the Strathmairn Iron Company at their foundry in Muirton Lane, Inverness, while raising an iron beam by means of a crane, was accidentally struck upon the head by the said beam, which fell in consequence of the breaking of a chain; further find that the said David Jones died at 4 o'clock in the afternoon of 4th February 1897, within the Northern Infirmary, Inverness; and further find that the cause of his death was fracture of the skull, the result of injuries sustained by him in the said accident.

V. *PROCEEDINGS AFTER INQUIRY*.—The Sheriff Clerk pays to each juror impanelled five shillings *per diem* and travelling expenses (s. 4 (9)). He recovers the amount from the county or burgh within which the accident took place (s. 4 (9)). The Procurator-Fiscal pays to the witnesses cited by him such sums as are allowed to Crown witnesses attending a criminal trial by jury in the Sheriff Court (s. 5 (6)). He obtains from the Sheriff Clerk a copy of the petition, the recorded evidence or a copy, any reports and productions or copies (if in writing), and a copy of the verdict: all which, with the usual schedule for the Registrar of Deaths, and a report of the circumstances, he transmits to the Crown Agent (s. 5 (5)). Copies of the petition, evidence, and reports are, on requisition, furnished by the Sheriff Clerk to H.M. Inspectors of Mines or Factories (s. 5 (5)); and copies are also obtainable, on payment, by any person interested (s. 5 (5)). The Act does not alter or affect the existing law and practice as to inquiry and report by the Procurator-Fiscal: as to the powers of the Lord Advocate



to order public inquiries to be held: or as to criminal proceedings against any person responsible for a death (s. 6).

[Brown, *Procedure in Accident Inquiries and Investigations in Scotland*, 1897.]

**Father.**—See PARENT AND CHILD; AFFILIATION; BASTARD; CURATOR.

**Fatuous Person.**—See INSANITY.

**Fault.**—See CULPA; SALE; WARRANTY.

**Feal and Divot: Fuel.**—Among the minor rural servitudes known to the law of Scotland are included the servitudes of feal and divot and of fuel. There is practically no distinction between these two rights. "The servitude of feal and divot is the right one has of turning up feals or divots from the surface of the servient tenement, and carrying them off for thatch to his house, or for the other uses of the dominant tenement. Much like to this is the servitude of fuel, which is a right of raising turf or peats from the servient moss or peat land for fuel to the inhabitants of the dominant tenement" (Ersk. ii. 9. 17). The rights are usually, though not necessarily, associated with the right of pasturage (*Haining*, 1668, Mor. 2459; see COMMON PASTURAGE). Both these servitudes imply a right to use the nearest ground of the servient tenement for the purpose of laying out and drying the turf, peats, or feal; and also a right of access, generally by cart-road, to the ground (*Ross*, 1751, Mor. 14531; *Duguid*, 1748, Mor. 14536); grass for the horses employed (*Dingwall*, 1797, 3 Pat. 564). Neither of these servitudes is to be extended further than "what is sufficient to answer the purposes of those who possess and have their actual residence upon the grounds found entitled to the servitude" (*Brown*, 1775, Mor. 14542; *Watson*, 1667, Mor. 14529, 1 Bro. Supp. 615 (where the right was restricted to such part of a muir as was sufficient for the use of the servitude)). The only recent case in which such a servitude was judicially discussed is *Grierson*, 1882, 9 R. 437.—[See Bankt. pp. 986, 1014; Stair, ii. 7. 13; Rankine on *Landownership*, 3rd ed., 399, and cases there cited.]

**Fear.**—See EXTORTION.

**Feciales.**—See JUS FECIALE.

**Fees.**—See EXPENSES; HONORARIUM; ADVOCATE.

**Fee and Liferent.**—See LIFERENT.

**Fee-Fund.**—Fee-fund dues were first established in 1810 by 50 Geo. III. c. 112. That Act abolished the former dues of Court, which were

payable to the Clerks of Session. A collector of fee-fund was appointed, and it was his duty to collect fees specified in a schedule to the Act. No paper could be lodged before the dues had been paid. The Court of Session Act of 1838, 1 & 2 Vict. c. 118, provided that a salary of £400 should be paid to the collector of the fee-fund. An accountant was also appointed. A schedule to the Act contained a new table of fees. By the Pupils Protection Act, 1849, 12 & 13 Vict. c. 51 a fee-fund was established in connection with judicial factories. By the Court of Laws Fees Act (Scotland), 1868, 31 & 32 Vict. c. 55, it was provided that the Commissioners of Her Majesty's Treasury might, after notice published in the *Gazette*, declare that all fees payable in money in the law Courts in Scotland should be collected by means of stamps, either adhesive or impressed, as the Commissioners might direct. It was also provided that, as soon as the Commissioners should take advantage of this power, the offices of collector and accountant of the fee-fund should be abolished.

The Commissioners to the Treasury did not give the direction till 1873, but since then fees have been collected in stamps. Sec. 16 of the Judicial Factors (Scotland) Act, 1889, 52 & 53 Vict. c. 39, abolished the fee-fund which had been created by the Pupils Protection Act, and ordered payment to be made in stamps.

By the Clerks of Session (Scotland) Act, 1889, 52 & 53 Vict. c. 54, s. 9, there was abolished a provision of 11 Geo. IV. and 1 Will. IV. c. 69, which had exempted maritime and consistorial causes from payment of ordinary fees, and it was enacted that in these causes the same fees should be exigible as in any ordinary action in the Court of Session, "provided that it shall be competent to the Lord Ordinary, in any consistorial cause, upon cause shown, to declare that it shall not be subject, or shall be subject only to a modified extent, to payment of Court dues."

By the Courts of Law Fees (Scotland) Act, 1895, 58 Vict. c. 14, power was given to the Lords Commissioners of the High Court of Justiciary as to that Court, and to the Lords of Council and Session as to the Court of Session and Sheriff Courts, with the approval in each case of the Commissioners of Her Majesty's Treasury, to make, by Act of Adjournal or Act of Sederunt respectively, such rules and regulations as might from time to time be necessary for carrying out the following purposes: (a) To alter or otherwise regulate the amount of any fees for the time being payable in any of the above-named Courts of law, or in any office connected therewith, or to the officers thereof, and to prepare or approve of amended tables of fees in place of the fees now payable. (b) To frame regulations as to the time and place of payment of the said fees, and to prescribe forms of books to be kept in any office in which such fees are payable.

In pursuance of the power conferred by that Act, an Act of Sederunt was passed on 18 Dec. 1896, which altered the fees payable in the Court of Session and promulgated a new table of fees, to be collected by means of stamps as before. It also provided that no fees should be payable on extracts or copies required by any officer of the Crown on behalf of the public service, and that no officer of the Crown should pay fees on any note, or report, or incidental application which he might have to present to the Court in the course of his duty as an officer of the Crown. Parties suing *in forma pauperis* are exempted from the payment of the fees in the first instance; but when they are found entitled to expenses, the Court fees are to be included and decerned for. In any consistorial cause in which Court fees have been paid by both or either of the parties, the Lord Ordinary or Court may, on cause shown, remit the whole or any portion of such fees, and order

the same to be repaid to both or either of the litigants. The new table of fees is annexed to the Act.

An Act of Adjournal regulating the fees of the High Court of Justiciary was passed on 18 Dec. 1896.

**Fee-Simple.**—This term is occasionally used in Scotland in contradistinction to an entailed estate. In English law it is applied to an inheritance descendible to heirs in general, and pure of any condition, limitation, or restriction, to any particular heirs.

**Fellow-Workman and Fellow-Servant.**—The plea that pursuer was injured through the fault of a fellow-servant, and that defender is therefore not liable, is a defence open to an employer in an action at the instance of a servant for damages for injuries received in the course of his work. It is a limitation of a master's ordinary vicarious liability for the negligence of his servants, and was introduced on the ground that a servant on entering an employment, by an implied term of this contract, took upon himself the risks arising from the negligence of others engaged in that employment. The doctrine was first laid down in England in *Priestley*, 1839, 3 M. & W. 1, and, after some fluctuation, was finally settled for Scotland by the decision of the House of Lords in *The Bartonshill Coal Co.*, 1858, 3 Macq. 266.

Since the plea is understood to depend on a condition in the contract of employment, it follows that no one but the employer of the pursuer can plead the benefit of the contract (*Johnson*, 1891, A. C. 371; *Adams*, 1875, 3 R. 215; *McCallum*, 1893, 20 R. 385), that the plea cannot arise where service is not voluntarily undertaken, as in the case of compulsory pilot (*Smith*, 1875, 44 L. J. Q. B. 60), and that it does not protect a master against his own fault (*Robertson*, 1891, 18 R. 1221; *Scott*, 1862, 24 D. 186; *Ashworth*, 1861, 30 L. J. Q. B. 183). It is also deduced, from the implied condition in the contract, that a servant does not take on himself the risk of negligence on the part of another servant who is not engaged along with him at a common work (*Johnson*, *Bartonshill Coal Co.*, *supra*). Employees of all grades, however, are fellow-servants (*Wilson*, 1868, 6 M. (H. L.) 84, 89, 90), as, for instance, a manager for a limited liability company of an oilwork and a workman (*Conolly*, 1894, 22 R. 80), a railway inspector and labourer (*Macfarlane*, 1867, 6 M. 102), or a ship captain and one of the crew (*Leddy*, 1873, 11 M. 304). Recently attempts have been made to draw a distinction between a servant's duty and a master's duty, and to hold that the latter cannot be delegated so as to raise the plea of fellow-workman (*Wright*, 1893, 20 R. 363; *Wallace*, 1892, 19 R. 915; *Macdonald*, 1896, 23 R. 504). As, however, at the time of writing, the Legislature is introducing large changes in this branch of the law, further consideration of the subject is reserved for the article MASTER AND SERVANT.

**Felony.**—Felony is an English law term. It occurs only rarely in Scots law (*Alison*, ii. 18); and chiefly in Statutes made applicable to Scotland. As regards Scotland, "felony" is, by 52 & 53 Vict. c. 63, s. 28, declared to mean (in that and subsequent Acts) a *high crime and offence*; and "misdemeanour" an *offence*. By the Crim. Proc. Act, 1887 (50 & 51 Vict. c. 35, s. 8), it is no longer necessary in an indictment to allege that



the act charged was done "wickedly and feloniously," such qualifying allegation being implied in every case in which, according to the previously existing law and practice, its insertion would have been necessary.

**Felony, Treason.**—See TREASON FELONY.

**Females.**—See WOMEN.

**Fences.**—The large class of cases arising out of injuries caused by the want or insufficiency of fencing will be dealt with more conveniently under the title of REPARATION (*q.v.*) It is here proposed to deal with the questions of property in fences, and the rights and obligations in regard to erecting, maintaining, and removing fences.

1st. *Questions between Landlord and Tenant.*—An agricultural lease usually contains an express clause regulating the rights of parties as regards fences, but apart from all stipulation, there is at common law an implied obligation on the landlord to put the fences on a farm into "tenantable repair" on the lessee's entry; and a corresponding obligation on the lessee to maintain the fences during the lease, and leave them at his removal in the same tenantable condition as he received them (Bell, *Prin.* ss. 1253–1256; Ersk. II. vi. 39 (note); Bell on *Leases*, i. 243–245; *Dudgeon*, 23 Nov. 1813, F. C.; *Purves*, Hume, 794; *M'Master*, Hume, 858; Hunter, *Landlord and Tenant*, i. 311–312, ii. 218, and note; Rankine on *Leases*, 233). Contrary dicta appear in *Haining*, Hume, 829, and *Harrold*, 6 D. 1103, but these cases were decided on specialties, and they are not considered to interfere with the general rule. The same remark applies to *Belchies* (1776, 5 Bro. Supp. 516), where the lease was of the *universitas* of an estate already let in separate farms on subsisting leases. These obligations, and even the express stipulations contained in leases, are construed with reference to the fences existing at the date of the tenant's entry (*M'Master*, Hume, 858). If, during the currency of his lease a tenant for his own purposes erects fences, he must, at his removal, either clear them away and leave the ground free from incumbrance, or put the fences in a proper state of repair (*Andrew*, 19 January 1811, F. C.). But the right to remove a fence is to some extent dependent on the circumstances in which it was erected and the materials used (*Syme*, 24 D. 202; *D. of Buccleuch*, 9 M. 1014). But while the burden on the tenant may not be increased during the currency of the lease by making him maintain new enclosure fences erected by the landlord at his own hand, it is otherwise in regard to march fences, which the landlord may be compelled by the coterminous proprietor to join in erecting under the provisions of the Acts 1661, c. 41; 1669, c. 17; and 1685, c. 39. The tenant is bound to maintain march fences, though erected during the currency of his lease (*Dudgeon*, 23 Nov. 1813, F. C.).

Where a tenant, by the conditions of his lease, and the provisions of the Montgomery Act (see *infra*) under which it was granted, was bound to erect fences within a given time, and thereafter to maintain them, it was held that the obligation to maintain commenced as soon as the fences were erected; and the fences having been erected before the stipulated period, the tenant was prevented from allowing them to fall into disrepair, though he pleaded that his obligation to repair did not arise till the expiry of the stipulated time

(*Hamilton*, 9 D. 53). Again, where the landlord was bound in a lease to put the fences into repair to the satisfaction of parties named, the referees were held entitled to commute the obligation for a money payment, and decern against the landlord for the amount required to fulfil his obligation (*Macgregor*, 9 D. 1056). It was held competent for a landlord at the tenant's outgoing to present a summary application to the Sheriff for a judicial inspection of the present condition of the fences (*Gordon's Trs.*, 8 M. 906). In a lease the tenant accepted the fences as "in good tenantable repair," and became bound to uphold them in that condition during the lease; the landlord, after the commencement of the lease, removed some wire netting from a fence separating a plantation in his own occupation from the ground let, and in consequence the tenant's crops suffered from ground game. In an action at the tenant's instance, the landlord was held bound (1) to restore the wire netting, and (2) to compensate the tenant for the damage he had suffered by its removal (*Cameron*, 15 R. 489).

Where a tenant received a sum to put the buildings on his holding in repair, and became bound to uphold them in that condition, he was held not bound to repair damage occasioned by any extraordinary accident (*York Buildings Co.*, Mor. 10127). The same principle applies to fences (*Rankine on Leases*, p. 233).

By the Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), "making of permanent fences" is enumerated in schedule, Part I., as one of the improvements for which the tenant is entitled to recover compensation, if done with the landlord's consent. "Fencing" is mentioned in sec. 30 of the same Act as a fixture which, if erected by the tenant, shall remain his property, and be removable by him before, or within a reasonable time after, the termination of the tenancy. See AGRICULTURAL HOLDINGS (SCOTLAND) ACTS, *supra*, vol. i.

The schedule to the Crofters' Holdings (Scotland) Act, 1886 (49 & 50 Vict. c. 29), enumerates "walls and fences" amongst the "permanent improvements" for which crofters and cottars may obtain compensation under the provisions of secs. 8, 9, and 10. See CROFTERS' HOLDINGS ACTS, *supra*, vol. iii.

The Montgomery Act (10 Geo. III. c. 51), by which the power of the heir of entail in possession to let lands held in strict entail was extended, contains precise conditions respecting fences. Where a lease endures for thirty years, the tenant is bound to enclose it all within that time, one-third during each period of ten years (s. 2). The tenant shall also be bound to maintain the fences in good repair when made; and no enclosure shall be larger than forty acres, unless the nature of the ground renders it unsuitable for cultivation by the plough (s. 3). "Enclosing" is enumerated as one of the improvements which, if done under certain conditions, entitle the heir in possession to become creditor of his successors for three-fourths of the cost (ss. 9 *et seq.*). See ENTAIL.

2nd. *Questions between Seller and Purchaser.*—"Fences are *prima facie* held to be heritable accessories of the lands. When a man buys an estate, he buys it, in general, with the ordinary demarcations as they stand. It may be otherwise, for heritable and moveable are not qualities of things, but of rights. . . . Erection for a temporary purpose by a temporary occupant is essential to bring in the element of trade fixtures" (per L. J. C. Moncreiff in *Graham*, 2 R. 438; cf. sec. 30 of the Agricultural Holdings (Scotland) Act, 1883, *supra*). Accordingly, the liferenter of an estate, who had taken an active part in arranging a sale of it, was held barred from demanding from

the purchaser compensation for an iron fence erected by himself while occupying the subjects (*Graham, supra*).

3rd. *Questions between Superior and Vassal*.—There sometimes occur in feu-contracts obligations on the vassals to fence their feus, or execute certain other works, for the benefit of the neighbourhood. Such obligations will be construed strictly according to their terms. Thus a vassal, who was bound by his feu-contract to make a "sufficient" fence and road along the boundary of his feu, was held not bound to construct embankments and retaining-walls in order to make the gradients more easy (*Cumming*, 21 D. 752).

4th. *Miscellaneous Questions*.—Questions of succession will, in general, be decided on the rules as to heritable and moveable referred to in the second head, *supra*. Questions arising under particular deeds will be decided with reference to the terms of the deeds. Thus, a husband in his marriage contract conveyed to his wife absolutely "the whole household furniture . . . and other plenishing and effects, including heirship moveables . . . belonging to him, in so far as the same may form part of or be situated or used at, in, or in any way connected with, his ordinary or principal residence." It was held that iron fences in the policies, even such as could be taken down and re-erected without injury, did not fall under this description, and the opinion was expressed that the fences were heritable (*Tod's Trs.*, 10 M. 422).

By the Railway Clauses Consolidation (Scotland) Act, 1845 (8 & 9 Vict. c. 33), railway companies are bound to make and maintain, for the accommodation of the owners and occupiers of land adjoining the railway, *inter alia* fences separating the lands taken from the adjoining lands not taken (s. 60). But as the parties may contract out of this clause, an adjoining occupier may be barred, either expressly or by acquiescence, from claiming damages resulting from failure so to fence (*Barclay*, 10 R. 144). Failure to fence is no cause of action against a railway company by an occupier of land which does not adjoin the line (*Monklands Rwy. Co.*, 23 D. 1167; *Matson*, 5 R. 87, per L. P. Inglis, p. 93; *affd.* 5 R. (H. L.) 211).

Neither the authorities in charge of the public roads nor the adjoining proprietors are bound to erect fences at common law; and by Statute the road authorities are only bound to fence bridges, embankments, and other dangerous places (Roads and Bridges Act, 1878 (41 & 42 Vict. c. 51), Sched. C, s. 94). The adjoining proprietors who erect hedges are bound to have them properly trimmed (*ib.* s. 88).

By the Barbed Wire Act, 1893 (56 & 57 Vict. c. 32), provision is made for the removal of barbed wire (*i.e.* any wire with spikes or jagged projections) from fences on lands adjoining any highway, where such barbed wire may probably be injurious to persons or animals lawfully using such highway.

(On the whole subject of fences, see Rankine on *Landownership*, ch. xxxii.)

For the law relating to march fences, see **MARCHES**.

**Fencing the Court**.—The ancient ceremonies of fencing the Court and of closing the Court, by proclamation of a mace, at sittings of the High Court of Justiciary, were abolished in 1887 by the Criminal Procedure Act (50 & 51 Vict. c. 35, s. 46).

**Fencing Machinery**.—See **FACTORY AND WORKSHOPS ACT** (p. 218).



**Feræ Naturæ.**—See ANIMALS (PROPERTY IN, ETC.); ANIMALS (LIABILITY FOR DAMAGE CAUSED BY).

**Feriæ** were holidays on which legal and political business was suspended. All *feriæ* were thus DIES NEFASTI (*q.v.*). Among *feriæ* or *dies feriati* were included all days on which public festivals were celebrated. With reference to the special kinds of legal business which it was permissible to bring before the prætor on *feriæ*, see *Dig.* 2. 12. 2.

After the triumph of Christianity in the Roman Empire, the old *feriæ* were abolished, and the Sabbath, together with the Christian festivals, were substituted. Legal proceedings and all other public business, accordingly, became illegal on Sundays.

**Ferry.**—After the introduction of feus, the right of ferry, which was by the Roman law accounted *res publica*, became *inter regalia*, or *in patrimonio principis* (Ersk. ii. 6. 17). But although a ferry is *inter regalia*, it does not give the right of ferry to all the public, any more than the public are entitled to fish for salmon because salmon-fishings are *inter regalia* (*Duke of Montrose*, 1845, 10 D. 900). Originally, the right of ferry was granted to individuals and burghs for the public convenience and for the profit of the donee. After a time ferries became part of roads and fell under the road authorities, and a distinction then arose between public and private ferries. Ferries created by a special Act of Parliament are called public, and are managed by the road authorities. Ferries created by a grant from the sovereign to a particular person are styled private. Many ferries “grow up by use, without any distinct original erection” (*Duke of Montrose*, 1848, 10 D. 900, per L. J. C.), *e.g.* it sometimes happens that a ferry belongs to the trustees of the road which has been made down to the banks or shores of a river or arm of the sea, or to the proprietor of the banks on which the road has been made. A grant of right of ferry implies the exclusive right of conveying passengers and their baggage between the two sides of a narrow sea, or of a river or loch (*Moir*, 1832, 11 S. 32; *Baillie*, 1866, 4 M. 625; *Pim*, 6 M. & W. 234). A grant of ferry does not extend to the privilege of carrying goods (*Fergusson*, 18 Jan. 1815, F. C., per Ld. Glenlee; *Walker*, 10 M. & W. 161).

**Title.**—The title to a public ferry, from its nature, is not open to question. The title to a private ferry may be a charter from the Crown or from a private individual followed by prescription (*Dundee Harbour Trs.*, 1848, 11 D. 6; *Tarbat*, 1731, Mor. 4167, 10 D. 903). A title to a ferry may also arise from a charter of barony (*Duke of Montrose*, 1848, 10 D. 896, 900), or from a charter of royal burgh, followed by prescription (*Greig*, 1851, 13 D. 975). In the *Duke of Montrose* (*supra*) opinions were expressed that a barony title was sufficient without prescription (*vide* L. J. C. Hope and L. Wood, *contra* L. Ivory); and even that an ordinary charter, followed by prescription, gave a title (*vide* L. J. C. Hope and L. Cunningham).

**Extent of the Right.**—In exercising a right of ferry there must be no interference with ordinary navigation. A ferry is “part of the highroad of the country,” which is not to be encroached upon (*Campbell*, 15 Jan. 1815, F. C.), and the grantee of the right may interfere to prevent any evasion of the right. It is not evasion for the owners of a steamboat to convey passengers on board to and from the shore in a private boat,

although a right of ferry exists where this is done (*Hunter*, 1830, 9 S. 86; *Muir*, 1832, 11 S. 32). A person resident within the bounds of a ferry may convey himself, his family, servants, and visitors; but it is illegal for him to convey even gratuitously any other (*Tarbut*, 1831, Mor. 4167, 10 D. 903; *Martin*, 16 June 1818, F. C.; *Weir*, 1858, 20 D. 968; *Mearns*, 1872, 2 Couper, 296). The right of ferry is properly an exclusive right to convey passengers by boat only, and there seems to be reason to suppose that an action for disturbance or infringement does not lie against one who interferes otherwise than by means of boats, e.g. by building a bridge (*Bell, Prin.* s. 653; *Hopkins*, 2 Q. B. 224).

The Crown cannot grant, and no one may set up, another right of ferry within the space covered by an existing ferry (*Hale*, c. 6, in *Hargrave's Tracts*, p. 32; *Campbell*, 18 Jan. 1815, F. C.; affd. 6 Pat. 417; *Ferguson*, 18 Jan. 1815, F. C.; *Kinghorn Ferry Trustees*, 1821, 1 S. 220; *Magistrates of Kirkcaldy*, 1846, 8 D. 1247; *Newton*, 5 C. B. (N. S.) 627, 12 C. B. (N. S.) 32, 13 C. B. (N. S.) 864; *Tripp*, 4 T. R. 666; *Huzzey* (2 C. M. & R. 432). A grantee of a ferry is not prevented from interdicting a person who encroaches upon the ferry because an evasive landing-place is used (*Magistrates of Kirkcaldy* (*supra*)). An application for interdict by parties possessing a right of ferry, who had allowed another party to establish ferry-boats and ply without challenge for several months, was refused pending a discussion of the question of right (*Fife Ferry Trustees*, 1827, 6 S. 268). A right of ferry, or part of the right, may be lost by disuse, or rather by contrary usage (*Rankine on Landownership*, p. 271). A right of ferry gives no ownership of the bank, even when permission has been given to erect a landing-place (*Baillie*, 1866, 4 M. 625). Where the grantee of a right of ferry can lawfully land passengers on the bank, he is not responsible if the passengers have afterwards to cross the land of another in order to reach a public place (*Crawford*, 1881, 8 R. 826).

The Justices of the Peace and the Commissioners of Supply had the supervision and regulation of ferries under their charge, and they had also the statutory right to regulate the fares at ferries (1669, c. 16; 1686, c. 8; 5 Geo. I. c. 30, s. 5; 8 & 9 Vict. c. 41; *Martin*, 1830, 8 S. 752). The County Council now take the place of the Commissioners of Supply (52 & 53 Vict. c. 50, ss. 11 and 12), and the Justices, along with the County Council, have the powers which formerly belonged to the Justices and the Commissioners. The Justices and the County Council are charged with the duty of enforcing the obligations which lie on the grantee of a ferry (*Ersk. i.* 4. 14: Bankt. 2. 7. 22. 23; *Bell, Prin.* 653; *Campbell*, 18 Jan. 1815, F. C.; affd. 6 Pat. 417; *Martin*, 1830, 8 S. 952; *Justices of the Peace of Fife*, 1762, Mor. 1988, 7617; *Justices of the Peace of Midlothian*, 1775, Mor. 7620). The obligations on the grantee are to provide safe and convenient boats and boatmen for the passage; to transfer passengers and luggage, and, if such has been the custom, carriages also (*Rankine on Landownership*, p. 271). Fair and reasonable rates may be levied (*Magistrates of Montrose*, 1755, Mor. 4167, 2 Ill. 7; see *Cumming*, 1852, 14 D. 855). The rates may be altered with the sanction of the Justices and the County Council. The duty of the Justices and the County Council is to allow a moderate profit. They may raise the rates when an extraordinary outlay is required (*Magistrates of Montrose*, 1755, Mor. 4167; *Martin*, 1830, 8 S. 952). They may also sanction the substitution of a bridge for a ferry, if the bridge is more convenient and the tolls are not higher than the ferry dues (*Cumming*, 1852, 14 D. 885).

**Fertilisers and Feeding Stuffs Act.**—The Fertilisers and Feeding Stuffs Act, 1893 (56 & 57 Vict. c. 56), provides:—

*Section 1.*—Every person who sells for use as a fertiliser of the soil any article manufactured in the United Kingdom or imported from abroad, must give the purchaser an invoice stating the name of the article, and whether it is an artificially compounded article or not, and what is at least the percentage of (1) nitrogen, (2) soluble and insoluble, (3) phosphates and potash, if any, contained in the article. The invoice has effect as a warranty by the seller of the statements contained therein. For the purpose of the above-mentioned provisions an *article* is deemed to be manufactured if it has been subjected to any artificial process. The provisions of the section do not apply where the amount sold does not weigh *half a hundredweight* (s. 1 (2) (3)).

*Section 2.*—Every person who sells for use as food for cattle any article which has been artificially prepared, must give the purchaser an invoice stating the name of the article, and whether it has been prepared from one substance or seed, or from more than one substance or seed. This invoice has the effect of a warranty by the seller of the statements contained therein. Where any statement is made as to the ingredients from which the article is made, or as to the percentage of these ingredients which it contains, there is an implied warranty that the article is made from these substances only, and that it contains the percentage stated. There is also implied warranty that the article is suitable for feeding purposes.

*Section 3.*—(a) Failure, without *reasonable excuse*, to give an invoice as required by the Act; (b) giving a false invoice or description; (c) selling as food for cattle any article containing an ingredient injurious to cattle, or to which has been added an ingredient worthless for feeding purposes, and not disclosed at the time of sale—entails a penalty not exceeding £20 for a first offence, and not exceeding £50 for any subsequent offence. It is not a defence to say that the buyer only bought for the purposes of analysis, and therefore was not prejudiced (see *Hoyle*, 4 Q. B. D. 233).

A person who is alleged to have committed an offence under the above section in respect of an article sold by him, is entitled to the same rights and remedies, civil or criminal, against the person from whom he bought the article as are available to the person who bought the article from him, and any damages recovered by him may, *if the circumstances justify it*, include the amount of any fine and costs paid by him on conviction under this section and the costs of and incidental to his defence on such conviction (s. 3 (3)).

*Section 4.*—For the purposes of the Act the Board of Agriculture appoint a chief analyst, and a County Council shall, and the Council of any burgh (*i.e.* a burgh which returns or contributes to return a member to Parliament, not being a burgh to which sec. 14 of the Local Government (Scotland) Act, 1889, applies) may, appoint or concur with any other Council in appointing an analyst for the purposes of the Act.

*Section 5.*—Every purchaser of any article used for fertilising the soil, or as food for cattle, may, on payment of a fixed fee, have a sample analysed by the district analyst. The purchaser must take three samples—giving one to the seller, one to the analyst, and retaining one himself.

*Section 7.*—Prosecutions under the Act may be instituted by the person aggrieved, or by the Council of a county or burgh, or by any body or association authorised by the Board of Agriculture; but in the case of offences under sec. 3 a prosecution shall not be instituted by the person aggrieved, or by any body or association, except on a certificate by the Board of Agriculture that there is reasonable ground for the prosecution.



*Section 9.*—Penalties may be recovered summarily before the Sheriff under the Summary Jurisdiction Acts, and an appeal may be taken in accordance with these Acts.

The Board of Agriculture have published regulations in regard to the manner of taking samples under the Act.

[See Dyer, *Fertilisers and Feeding Stuffs*.]

**Feu.**—See FEU-CHARTER; FEUDAL SYSTEM.

**Feu-Charter.**—A new feudal fee is, at the present time, most commonly created by the granting of a feu-charter by a proprietor of land, whose title has been duly completed, and by infestment on the charter. Infestment is now taken either by recording the charter, with a warrant of registration in favour of the grantee, in the division of the General Registration of Sasines applicable to the lands, or by expeding and recording, with a warrant of registration, a notarial instrument in such division of the General Register of Sasines. The charter and the infestment constitute the relationship of superior and vassal between the granter and the grantee. Before dealing with the feu-charter in its modern form, and with the modes of infestment now in use, it is necessary to show how the feudal relationship of superior and vassal was formerly constituted.

#### 1. CHARTER AND INFESTMENT PRIOR TO THE INFESTMENT ACT, 1845.

(1) *Proper and Improper Investiture.*—For the constitution of the relation of superior and vassal no writing was, by our earliest customs, required. At first a proprietor delivered on the lands and in the presence of his vassals (called *pares curie*), or at least two of them, a portion of the lands as representing the whole to his grantee, and the grantee took the oath of fidelity. On this being done, the granter and the grantee became respectively superior and vassal. When the granter had no vassals, two or more strangers were called to witness the ceremony of giving possession to the grantee. In the course of time the granter, after possession had been given to the grantee, came to give a declaration of the grant in writing, which was called *breve testatum*, and to which the granter and the witnesses appended their seals (Ersk. ii. 3. 17). Instead of a *breve testatum* sealed by the granter and witnesses, a certificate of a notary public, or of two witnesses from among the granter's vassals, was sometimes given as an attestation of the delivery of possession to the grantee (Menzies, 529; Bell, *Lect.* vol. i. 577). The form of constituting the feudal relationship above described was called *proper investiture*, because possession was given by the granter *in propria persona*. The *breve testatum* is the foundation of the modern charter. As it was often inconvenient for the granter to attend personally on the lands, the practice was introduced of executing the *breve testatum* prior to delivery of possession, and directing it to the granter's commissioner or bailie as a warrant to give possession to the grantee. The commissioner or bailie, after giving delivery of the lands to the grantee, either sealed the *breve testatum* in attestation of the delivery, or wrote out and sealed a separate declaration of the fact. On account of delivery having been given, not by the granter *in propria persona*, but by his commissioner or bailie, this form of creating the feudal relationship was called *improper investiture*. The declaration given

by the bailie in improper investiture is the foundation of the instrument of sasine. On proper and improper investiture, see Ersk. ii. 3. 17; Menzies, 528-529; Bell, *Lect.* vol. i. 576-577.

(2) *Charter*.—Both proper investiture and improper investiture as described in the preceding paragraph, were superseded, after the beginning of the fifteenth century, by the introduction of the practice of proprietors granting formal charters to their grantees. At first a separate precept authorising infeftment accompanied the charter; and the precept continued for fully two centuries to be granted in a writ separate from the charter. But by 1672, c. 7, it was enacted that all precepts on charters granted by the Crown should be engrossed in the charters towards the end of them; and this provision soon gave rise to the custom of embodying precepts of sasine in charters which were granted by subject-superiors. After stating the way in which the precept of sasine became part of the charter, Erskine adds: "Now, therefore, all charters, without exception, conclude with a precept of seisin, which may be defined a command by the superior, who grants the charter, to his bailie, to give seisin or possession of the subject disposed to the vassal or his attorney by the delivery of the proper symbols" (Ersk. ii. 3. 33). As will be explained in the sequel, a precept of sasine is no longer a necessary part of a charter.

The steps necessary for constituting the feudal relationship, for many years prior to the commencement of the Infeftment Act, 1845, were (*a*) the granting of a charter: (*b*) symbolical delivery by the appropriate symbols on the ground of the lands disposed by the charter; and (*c*) the expeding by a notary, and the recording within sixty days of its date, of an instrument of sasine in favour of the grantee, either in the General Register of Sasines, or in the Particular Register of Sasines appropriate to the lands.

The charter, in the form used prior to the Infeftment Act, 1845, was as follows:—

- |                        |  |
|------------------------|--|
| 1. Narrative Clause.   | Know all men by these presents that I, <i>A.</i> , heritable proprietor of the lands and others hereby disposed, in consideration of the sum of £ instantly paid to me by <i>B.</i> , and of which I hereby acknowledge the receipt, renouncing all exceptions to the contrary, and of the feu-duty hereinafter stipulated to be paid to me, and for other causes me moving,   |
| 2. Dispositive Clause. | have SOLD, ALIENATED, and in feu-farm DISPOSED, as I by these presents SELL, ALIENATE, and in feu-farm DISPOSE from me, my heirs and successors, to and in favour of the said <i>B.</i> , his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE the lands of <i>X.</i> [ <i>here describe the lands</i> ], lying within the parish of _____ and shire of _____,  |
| 3. <i>Tenendus</i> .   | together with the teinds both parsonage and vicarage thereof, and parts, pendicles, and pertinents of the same: To BE HOLDEN and to HOLD all and sundry the lands, teinds, and others above disposed by the said <i>B.</i> and his foresaids of and under me, and my heirs and successors whomsoever, as their immediate lawful superiors of the same in feu-farm, fee, and heritage for ever by all the righteous meiths and marches thereof, as the same lie in length and breadth, with houses, biggings, etc., freely, quietly, well, and in peace,  |
| 4. <i>Reddendo</i> .   | without any revocation or obstacle whatsoever: Giving therefor yearly the said <i>B.</i> and his foresaids to me and my foresaids the sum of £ _____ sterling in name of feu-duty, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at Whitsunday next for the half-year preceding, and so forth at the said two terms in the year in all time thereafter; and DOUBLING the said feu-duty the first year of the entry of each heir or singular successor to the lands and others foresaid, and these for all other burden, exaction, demand, or secular service whatsoever which can be anyways exacted for |

the lands and others foresaid, or any part thereof, in all time coming : WHICH 5. Clause of LANDS, TEINDS, and others above disposed, with this feu-right, and the infeft- Warrandice. ment to follow hereon, I BIND and OBLIGE me and my foresaids to WARRANT to the said B. and his foresaids at all hands and against all mortals : AND FURTHER, I hereby make and constitute the said B. and his foresaids 6. Assignment my cessioners and assignees in and to the whole writs and evidents, titles to Writs and and securities of the said subjects granted in favour of me, my authors Rents. and predecessors, and that to the effect of maintaining and defending the said B. and his foresaids in the right of the subjects hereby conveyed ; and as the same cannot be herewith delivered up, I oblige myself and my foresaids to make the same forthcoming to the said B. and his foresaids whenever they have occasion for the same, and that upon a proper receipt and obligation for redelivery within a reasonable time under a suitable penalty : As ALSO, I hereby assign, transfer, and make over to the said B. and his foresaids the rent and duties of the said lands and others from and after the term of Martinmas , which is hereby declared the term of his entry to the premises, and in all time coming, with power to call, sue for, uplift, and discharge the same ; which 7. Warrandice of preceding Assignment. assignation I oblige myself and my foresaids to warrant as follows, viz., in so far as concerns the writs and evidents at all hands and against all mortals, and in so far as concerns the rents from my own facts and deeds only : And further, I hereby oblige me and my foresaids to free and 8. Relief from public burdens. relieve the said B. and his foresaids of all cess, minister's stipend, and other public and parochial burdens exigible furth of the said lands and others preceding the said term of Martinmas, the said B. and his foresaids being bound to free and relieve me and my foresaids of the same in all time thereafter : And I consent to the registration hereof in the Books of Council and Session, therein to remain for preservation, and for that purpose constitute my procurators, etc. : MOREOVER, I 9. Clause of Registration. hereby desire and require you , and each of you, my bailies in that part hereby specially constituted, that on sight hereof ye pass to the ground of the said lands and others, and there give and deliver to the said B. or his foresaids heritable estate and sasine, real, actual, and corporal possession, of all and whole the lands, teinds, and others particularly above specified, with the parts and pertinents thereto belonging, lying, and described as aforesaid, and here held as repeated *brevitatis causa*, to be holden in manner foresaid, and for payment of the feu-duties before specified, and that by deliverance to the said B. or his foresaids, or to his or their attorney, in his or their names, bearers hereof, of earth and stone of the ground of the said lands, and an handful of grass and corn for the said teinds, with all other symbols usual and necessary ; and this in noways ye leave undone : WHICH to do I COMMIT to you and each of you, my bailies in that part foresaid, my full power by this my precept of sasine directed to you for that effect.—IN WITNESS 10. Precept of sasine. whereof, these presents, written upon this and the preceding pages of Clause. stamped vellum by C., clerk to D., are subscribed by me at the day of one thousand eight hundred and years, before these witnesses, E. and F.

(*Jurid. Styles*, 4th ed., vol. i. 16.)

Of these clauses it is here necessary to notice in detail the precept of sasine ; the import of the rest will appear hereafter.

The precept of sasine was the executive clause of the charter. It had to contain a mandate (1) to give delivery or sasine to the disponent, who required to be identified ; and (2) to define in itself, or by reference to other parts of the deed, the lands disposed, which required to be described particularly, or so identified that they could be ascertained (Bell, *Prin.* 876).

Whilst infeftment given to a person not specially named—*e.g.* "the heir of A."—is inept (*Blackwood*, 1740, Mor. 14327, 2 Ross' L. C. 18), it is thought that an instrument of sasine, proceeding on a charter in favour of a person not specially named therein,—*e.g.* the heir of A.,—would be quite valid if it set forth the name and designation of the person indicated by



the warrant, at least if he had established by service, or other habile means recited in the instrument, his character as heir or otherwise in respect of which he was entitled to infeftment (Bell, *Prin.* 876; Menzies, 561). Indeed, it is thought that if a feu-charter or a disposition is in favour, *e.g.*, of the "heir of A.," infeftment can now be taken in his favour by recording the deed with a warrant of registration, naming and designing him, and also describing him as the heir of A., or by expeding and recording a notarial instrument in which he is so named, designed, and described; and that he does not require, for the validity of his infeftment, to establish his character as heir by service or other procedure, however advisable it may be to do so from a practical point of view (see Ersk. 2. 3. 33; Menzies, 561; Bell, *Prin.* 876; *Burston*, 1858, 20 D. 612; *Hutchison*, 1872, 11 M. 229). It has been held that, under a destination to A. in liferent alienarly, and the heirs of his body in fee, or under a similar destination in which a person has a liferent for himself and a fiduciary fee for others, the fiduciary fee can be feudalised by infeftment in terms of the destination, but that infeftment in liferent only in favour of the fiduciary fiar does not feudalise the fee (*Falconer*, 1824, 2 S. 633; *Houlditch*, 1847, 9 D. 1204; *Dundas*, 1823, 2 S. 145; *Maule*, 1876, 3 R. 831); and also that an infeftment in liferent in favour of one who is fiar does not feudalise the fee (*Graham*, 1759, Mor. 6931). A precept of sasine to give infeftment in lands described in general to belong to the granter of the precept is a sufficient warrant to give infeftment in every particular tenement which, by production of the granter's infeftments, is vouched to come under the general description; but it is necessary that such infeftments should not only be produced to the notary, but also specified in the instrument of sasine (*Wallace*, 1742, Mor. 6919; *Belches*, 21 Jan. 1815, F. C.). The general name of a barony, however, includes all its parts, and a warrant to infeft in the barony or any part of it was found sufficient without extraneous evidence to authorise infeftment in lands described as forming part of the barony (*Hill*, 1833, 11 S. 958). In the case of *Wallace* (1742, Mor. 6919), when a warrant bore an obligation to infeft in particular lands, and all other lands belonging to the disponent, and lying within a particular county, and the precept of sasine was in the same terms, the instrument of sasine thereon was held null, in so far as it comprehended the lands other than those particularly mentioned in the deed, because it did not bear, as regards the other lands, that the disponent's infeftment had been produced to the notary (see also *Duke of Norfolk*, 1739, 2 Ross' L. C. 28; *Belches*, 21 Jan. 1815, F. C.).

Precepts of sasine are classed as follows: (a) general (Bell, *Prin.* 876) and special (*ib.* 877); (b) unexhausted and exhausted (*ib.* 879); and (c) definite and indefinite. A general precept is one authorising infeftment in fee, whereas a special precept authorises infeftment in something short of a fee, *e.g.* in security or in liferent. On the ground that the greater includes the less, a general precept authorises a sasine in security (*Mitchell*, 1767, Mor. 14335, 2 Ross' L. C. 418; *Bonthrone*, 1805, Hume, 238, 2 Ross' L. C. 421; *Melvin*, 1843, 5 D. 1217), or in liferent (*Graham*, 1759, Mor. 6931), or in fee under the fetters of an entail (*Lord Napier*, 1762, Mor. 15418, 15461; *affd.* 1765, 2 Pat. 108). In the case of a disposition to trustees and their assignees, containing a power of sale, an obligation to infeft the trustees and their assignees, and a precept of sasine, it was held that a conveyance of the unexecuted precept to a purchaser, who took infeftment under it, formed a good feudal title (*Cockburn*, 1836, 14 S. 889). A precept is said to be unexhausted until it is duly executed, and exhausted when it has been duly executed. The due execution of a precept implies the due infeftment to

the full extent of the precept (see, *e.g.*, *Guthries*, 1677, 3 Bro. Supp. 140, and *Moncrieff*, 1830, 8 S. 416) of the person in whose favour it was conceived, or one in his right as his heir or assignee; and accordingly, if an instrument of sasine was not recorded (*Kibbles*, 1830, 9 S. 233; affd. 1831, 5 W. & S. 553, 2 Ross' L. C. 109; *Young*, 1847, 9 D. 932; affd. 1848, 2 Ross' L. C. 103), or recorded in the wrong register (*Kibble*, 16 June 1814, F. C.; *Town Council of Brechin*, 1840, 3 D. 216), or if there was a fatal error in the taking of sasine (*Lord Erskine*, 1743, 5 Bro. Supp. 732), or in the instrument of sasine itself (*Carnegie*, 1796, Mor. 8858), or in the recording of the instrument (*Kibble* 16 June 1814, F. C., 2 Ross' L. C. 109; *Watson*, 1818, Hume, 718; *Fulton*, 1831, 9 S. 442), the precept remained in force, so that a valid infeftment could thereafter be expedite in virtue of it. A definite precept is limited to one manner of holding, and an indefinite precept is applicable to more than one manner of holding. In the feu-charter the manner of holding is and has always been expressly *de mc*, and the precept of sasine in such a deed is called definite, and where a deed specifies or implies one manner of holding only, the precept, although indefinite in its terms, will be construed as definite, and therefore as directing infeftment to be given so as to constitute that holding and no other (see *Rowand*, 1824, 3 S. 196; *Pebbles*, 1825, 4 S. 290). It was not essential that the precept should specify the symbols of delivery, although it usually did so (*Barstow*, 1858, 20 D. 612).

Like procuratories of resignation, precepts of sasine could not, prior to the Act 1693, c. 35, be used after the death of either the granters or grantees of them. But that Act declared "that procuratories of resignation and precepts of seisin, either already granted or to be granted, shall in all time coming continue in full force and be sufficient warrants, not only for making of resignations and taking seisins in favours of the parties to whom they are or shall be granted, but likewise in favours of their heirs, assignees, and successors having right to the said procuratories and precepts, either by a general service, or by disposition and assignation, or by adjudication, as well after as before the death of the granters or parties to whom they are granted, or both, providing always that the instruments of registration and seisins taken after the death of either party express the titles of these in whose favours the resignation is made and to whom the sasine is granted, and that the same be deduced therein, otherwise to be void and null" (see also 8 & 9 Vict. c. 35, s. 9). A precept of sasine, however, cannot be assigned by the granter of it, even although the latter has power to revoke the deed in which it is contained (*Gammell*, 1849, 12 D. 19).

(3) *Principles of the Law as to Infeftment; Delivery of Sasine; and Instrument of Sasine.*—The form of the charter in use prior to the Infeftment Act, 1845, having been given, and the object of the precept of sasine having been explained, the giving of delivery or sasine falls next to be considered.

There are three cardinal principles on which the law regarding the taking of infeftment is based: (1) that the property must be delivered by the disponer to the disponee, according to the maxim *traditionibus, non nudis pactis, transferuntur rerum dominia*; (2) that the only evidence of delivery prior to the Titles to Land Act, 1858, was an instrument of sasine, whence arose the maxim *nulla sasina nulla terra*; and (3) that instruments of sasine to divest the former proprietor and invest the disponee, or, in other words, to confer a real right on the person in whose favour they are expedite, must be duly registered in the Register of Sasines. The ceremony of delivery, prior to the Infeftment Act, 1845, will be described presently.

From the nature of lands—which, unlike moveables, cannot pass by delivery from hand to hand—it follows that then, as now, the *traditio* applicable to them was symbolical. At first, when proper investiture existed, there was, as has been explained, no need in a transference of property for any writing; then came the stage of improper investiture in which the *breve testatum* was used, directing possession to be given, the *breve testatum* being either sealed in attestation of the delivery, or followed by a separate declaration of the fact that delivery had been given by the bailie; but for a long time the instrument of sasine under the hand of a notary public was a necessary solemnity for perfecting a feudal right in the disponent. The instrument of sasine, according to Craig, arose from the want of certainty, and the frauds which occurred in connection with the delivery of possession, and from the consequent need of evidencing the fact that possession had in reality been given (Craig, 2. 7. 2). Craig conjectures that instruments of sasine were not used in Scotland till the return of James I. from England in 1424 (Craig, 2. 2. 18); but Erskine points out that many instruments of sasine are extant dated about the beginning of the fifteenth century, and prints an instrument dated November 1400 (Ersk. 2. 3. 34). Before instruments of sasine were introduced, possession was necessary to give a real right in lands (Stair, 2. 3. 16; Ersk. 2. 3. 33); but after instruments of sasine came into use they became the necessary solemnities to evidence that right, and their place could not be supplied by any other means of probation. “Though the superior,” to use the graphic words of Stair, “with a thousand witnesses should subscribe all the contents of a seisin, it would be of no effect to make a real right without the attest of a notary, in which sense the vulgar maxim is to be understood, *nulla sasina nulla terra*, which is not only necessary to the first vassal, but must be renewed to all his heirs and successors” (Stair, 2. 3. 16; and see Ersk. 2. 3. 34; Menzies, 569; Bell, *Lect.* i. 649). Registration was introduced as a means of preventing frauds in connection with the alienation of land. The preamble of the Statute 1617, c. 16, which still remains the basis of our present registration system of land-rights, runs thus: “Considering the great hurt sustained by His Majestie’s lieges by the fraudulent dealing of parties, who having annallied their lands, and received great summes of money therefore, yet by their injust concealing of some privat right, formerly made by them, render the subsequent alienation done for great sums of money, altogether unprofitable; which cannot be avoided, unlesse the saids private rights be made publick and patent to His Highnes lieges.”

From the combined need of an instrument of sasine and of registration thereof for the completion of a real right in land, it has followed that an instrument of sasine unrecorded is null to every effect (Young, 1844, 6 D. 370; 1847, 9 D. 932; affd. 1848, 2 Ross’ L. C. 103; *Paterson*, 1705, Mor. 13,564; affd. 1714, Rob. App. 99, 2 Ross’ L. C. 78; and see *Keith*, 1703, 4 Bro. Supp. 542, 2 Ross’ L. C. 108), although the granter of the warrant and his heirs cannot plead the nullity (*Simpson*, 1678, Mor. 13553; *Gray*, 1626, Mor. 13540); that an instrument of sasine with an omission *in essentialibus*, although it is recorded, is also inept (*Davidson*, 1827, 6 S. 8, 2 Ross’ L. C. 65; *Macintosh*, 1825, 2 Ross’ L. C. 75), an inept infeftment being equal to no infeftment; and that the nullity of an unrecorded sasine is not cured by prescription, prescription not curing intrinsic nullity in a right (*Crawford*, 1729, 2 Ross’ L. C. 112).

At the ceremony of symbolical delivery five persons appeared: (1) an attorney on behalf of the disponent; (2) the disponent’s bailie; (3) a notary public; and (4 and 5) two witnesses. The disponent’s attorney produced



the charter containing the precept of sasine, delivered it to the bailie, and requested him to deliver sasine of the lands. The bailie then handed the deed to the notary public to be read and published. The notary public, having done so, returned the deed to the bailie. The bailie thereupon delivered to the attorney the symbols appropriate to the subjects in the grant; and the attorney, putting a piece of money into the notary's hands, declared that he took instruments, and called the attention of the witnesses to the fact that he had done so. The whole ceremony was performed on the ground of the lands of which delivery was given (Menzies, 570; Bell, *Lect.* vol. i. 650–651).

After the ceremony of symbolical delivery the notary public expedes an instrument of sasine in favour of the person in whose favour the delivery had been made. The instrument was as follows:—

IN THE NAME OF GOD, AMEN.—Know all men by this present public instrument that upon the \_\_\_\_\_ day of \_\_\_\_\_ in the year of our Lord \_\_\_\_\_ and of the reign of His Majesty George the Fourth, by the grace of God, of the United Kingdom of Great Britain and Ireland, King, Defender of the Faith, the \_\_\_\_\_ year, in presence of me, notary public, and of the witnesses hereinafter named and designed, and hereto with me subscribing, and upon the ground of the lands after described [respectively and successively, *if there be more parcels than one*] compared personally *D.*, as procurator and attorney for *B.*, whose power of attorney was sufficiently known to me, notary public: As also compared *C.*, bailie in that part specially constituted, by virtue of the precept of sasine hereinafter transcribed, contained in the feu-charter after narrated, the said *D.* having and holding in his hands the said feu-charter of the date under written, made and granted by *A.*, heritable proprietor of the lands and others after described, to and in favour of the said *B.*, whereby the said *A.*, for the causes therein specified, sold, alienated, and in feu-farm disposed from him, his heirs and successors, to and in favour of the said *B.*, his heirs and assignees whomsoever, heritably and irredeemably, All and Whole the lands of \_\_\_\_\_ [as in the feu-charter], lying within the parish of \_\_\_\_\_ and shire of \_\_\_\_\_; to be holden of and under him, the said *A.*, and his foresaids, in feu-farm, fee, and heritage for ever, for payment of the feu-duty and other prestations specified in the said feu-charter, as the same, containing clause of absolute warrandice, the precept of sasine hereinafter transcribed, and other usual clauses, more fully bears: Which feu-charter the said *D.*, as procurator foresaid, exhibited and produced to the said bailie, desiring and requiring him to proceed to the execution of the office of bailiary thereby committed to him: Which desire the said bailie finding to be reasonable, he received the said feu-charter into his hands and delivered the same to me, notary public subscribing, to be read and published to the witnesses present, which I did, and of which precept of sasine the tenor follows in these words:—“Moreover, I hereby desire and require you \_\_\_\_\_, and each of you, my bailies in that part hereby specially constituted, that on sight hereof ye pass to the ground of the said lands and others, and there give and deliver to the said *B.* or his foresaids heritable state and sasine, real, actual, and corporal possession, of all and whole the lands and others particularly above specified, with the parts and pertinents thereto belonging, lying and described as aforesaid, and here held as repeated *brevitatis causâ*, and that by delivery to the said *B.* or his foresaids, or to his or their attorney or attorneys, in his or their names, bearers hereof, of earth and stone of the ground of the said lands, with all other symbols usual and necessary, and this in nowise ye leave undone: Which to do I commit to you and each of you, my bailies in that part foresaid, my full power by this my precept of sasine directed to you for that effect.—In witness whereof, I have subscribed these presents, written upon this and the two preceding pages of stamped vellum by *G.*, clerk to *H.*, at the \_\_\_\_\_ day of \_\_\_\_\_ one thousand eight hundred and \_\_\_\_\_ years, before these witnesses, *E.* and *F.* (Signed) *A. E., witness. F., witness.*” After reading and publishing which feu-charter, containing the said precept of sasine, the said bailie

1. Invocation.

2. Date.

3. Appearance of the parties.

4. Production of charter, etc.

5. Exhibition of charter, etc.

6. Delivery and publication of charter.

7. Precept of sasine and testing clause of charter.

8. Delivery of sasine.

received the same again into his hands, and by virtue thereof and of the office of bailiary thereby committed to him, gave and delivered to the said *B.*, heritable state and sasine, real, actual, and corporal possession, of all and whole the lands and others particularly above specified, with the parts and pertinents thereto belonging, lying, and described as aforesaid, and here held as repeated *brevitatis causa*, and that by delivery to the said *D.*, as procurator foresaid, of earth and stone of the ground of the said lands [if teinds have been disposed by the charter, then add here “a handful of grass and corn for the said teinds”], with all other symbols usual and necessary, after the form and tenor of the said charter and precept of sasine in all points: Whereupon, and upon all and sundry the premises, the said procurator asked and took instruments in the hands of me, notary public subscribing: These things were so done upon the ground of the said lands and others [respectively and successively, *if more than one subject*], betwixt the hours of                      and                      of the day of the month in the year of our Lord and of the King's reign above written, before and in presence of *I.* and *K.*, witnesses to the premises specially called and required, and hereto with me subscribing.

9. Taking of Instruments Attestation.

10. *Acta errant*, etc., Clause.

11. Notarial docquet.

Et ego vero *L.* clericus Edinburgensis dioceseos, ac notarius publicus, auctoritate regali et per Dominos Concilii et Sessionis secundum tenorem acti parliamenti, admissus, Quia præmissis omnibus et singulis, dum, sic ut præmittitur, dicerentur, agerentur et fierent, una cum prænominatis testibus præsens personaliter interfui, eaque omnia et singula præmissa, sic fieri, et dici, vidi, scivi, et audi, ac in notam cepi, ideoque hoc præsens publicum instrumentum [*if there be a marginal addition, here insert cum marginali additione supra                      pagina*] manu mea [*if written by another hand, manu aliena; and if partly by the notary's and partly by another, partim manu mea partim aliena*], super hac et paginis præcedentibus pergamene debite impressæ, fideliter scriptum exinde confeci, ac in hanc publici instrumenti formam redegi signoque nomine et cognomine meis solitis et consuetis, signavi et subscripsi, in fidem, robur et testimonium veritatis omnium et singulorum præmissorum, rogatus et requisitus.

(*Jurid. Styles*, 4th ed., vol. i. 59.)

With regard to the instrument of sasine, it is necessary to make certain explanations. Although it seems never to have been authoritatively settled that the two dates given in the form of the instrument were essential, it was held that when both were given they had to correspond (*Town Council of Brechin*, 1840, 3 D. 216; *Lindsay*, 1844, 6 D. 771; and see *Ld. Curriehill in McFarlan, Pctr.*, 1853, 15 D. 708), and that although both were given, if one was written on an erasure, the instrument was inept (*Smith*, 1835, 13 S. 461; *affd.* 1840, 1 Rob. 173; and see *Dickson's Trs.*, 1820, Hume, 925). The date was necessary for fixing the time within which the instrument required to be registered (*McQueen*, 1823, 2 S. 637), but an instrument containing the correct date in its proper place was not rendered invalid by a wrong reference to it in a subsequent part of the writ (*Gordon*, 1773, 5 Bro. Supp. 587). It was essential that the instrument should bear that the ceremony took place on the ground of the lands disposed (Bell, *Lect.* i. 652), but an objection to an instrument of sasine *ex facie* regular, that sasine had been taken, not on the lands themselves, but on a contiguous spot of land, was not allowed to be proved by witnesses after a delay of twelve years (*Campbell*, 1819, Hume, 723). When the charter or other deed of conveyance contained different lands, which were either locally discontinuous or legally distinct, symbolical delivery had to take place on each of the different lands, and the instrument set forth the appearance of the notary public, the witnesses, the attorney, and the bailie on the ground of the lands described in the instrument respectively and successively (Bell, *Lect.* i. 659; *Menzies*, 575). “Although the instrument,” says Bell,

(*Prin.* 871), "commonly and correctly bears that sasine was given on the lands of the several parcels respectively and successively, yet where the expression is not exclusive of this fact (as that sasine was taken 'on the ground of the said lands'), and the words are such as accord with the supposition of the correct delivery of sasine, it seems to be sufficient (see *Maxwell*, 1628, Mor. 14318; *Lord Hermiston*, 1630, Mor. 14326; *Gordon*, 1773, 5 Bro. Supp. 587). Where the words are exclusive of the supposition of successive acts (as if the instrument should bear that sasine was taken on a particular spot), it will be bad as to all the several portions." Lands were deemed legally distinct when they were held (a) by different tenures; (b) by different titles, even of the same superior; or (c) of different superiors (Bell, *Prin.* 874; Bell, *Lect.* i. 659; Menzies, 575; Ersk. 2. 3. 44; *Bank of Scotland*, 1729, Mor. 16404; and see *Grant*, 1837, 15 S. 563). Separate acts of symbolical delivery were also necessary when the deed contained, in addition to lands, other tenements (e.g., salmon-fishings) for which earth and stone were not the appropriate symbols (Bell, *Lect.* i. 660; and see Ersk. 2. 3. 44). When, however, lands either locally discontiguous or legally distinct, or lands with teinds, fishings, etc., had been erected into a barony, delivery could be made by the symbols of earth and stone for the lands and other subjects at the place appointed by the charter of barony, or, if no place was so appointed, then on any part of the lands (Ersk. 2. 3. 46; Menzies, 576; Bell, *Lect.* i. 660). Further, the Crown could, by a clause of union in a charter, unite subjects lying locally discontiguous, or requiring different symbols for delivery; and if in the clause of union a place for delivery was appointed, delivery took place there, but if no such place was appointed, delivery could be given on any part of the united lands (Bell, *Prin.* 874; Bell, *Lect.* i. 660; and see *M'Lean*, 1777, 5 Bro. Supp. 590; *Scott*, 1777, Mor. 13519; *Montgomerie*, 2 March 1813, F. C.: *Whitefoord*, 1788, 3 Pat. 101; *Morehead*, 1791, 3 Pat. 199; *Napier*, 1822, 1 S. 522). If part of the lands included in a charter containing a clause of union, or part of the lands of a barony, was sold, both the part retained and the part disposed under a feu-charter or a disposition had the benefit conferred by the union (*Blairquhen*, 1637, Mor. 16401; *Heron*, 1771, Mor. 8684; *Wood's Trustees*, 1832, 10 S. 773; affd. 1834, 7 W. & S. 147 (dispensation extends to rights in security); *Ogilvie*, 1768, Mor. 8792; rev. 1768, 2 Pat. 141; *Lyall*, 1768, 2 Pat. 138; *Brown*, 1813, Hume, 717; *Montgomerie*, 2 March 1813, F. C.). A clause of union granted by a subject-superior was ineffectual unless confirmed by the Crown (*Aitken*, 1623, Mor. 16397; *Borthwick*, 1636, Mor. 16401). When lands were neither erected into a barony nor united by a clause of union, the symbols for teinds were delivered on the ground of the lands: those for fishings, at the fishing-station: those for rights of patronage, within the parish church: and those for mills, within the mills (Bell, *Lect.* i. 660).

Any notary public who was not interested in the transaction could act as notary in giving sasine (Bell, *Lect.* i. 652); and, in one case, an opinion was expressed that a notary was not disqualified from expeding an instrument in execution of a precept of sasine granted by himself (per *Ld. Gillies* in *Sim*, 1831, 10 S. 85). The notary public was entitled to assume that any person in possession of the warrant containing the precept was duly empowered to act as attorney (Bell, *Lect.* i. 653), and an attorney could represent any number of disponees (*Grant*, 1750, Mor. 14325), although it was open to those interested to show that sasine had been taken without their authority (*Gray*, 1838, 1 D. 227). If there was no doubt about the identity of the attorney or the bailie, the fact that either



was not fully named and designed was treated as a latent ambiguity, not invalidating the instrument (*Morton*, 1828, 7 S. 172; *affd.* 1830, 4 W. & S. 379; *Macgillivray*, 1824, 3 S. 378, N. E. 267; and see *Lord Napier*, 1762, 5 Bro. Supp. 587, 588; *affd.* 1765, 2 Pat. 108; *Duke of Argyll*, 1873, 11 M. 616); and where an instrument bore that the same person acted as both bailie and attorney, it was sustained, as it appeared otherwise from the writ that a person other than the bailie had demanded sasine (*Hilton*, 1676, Mor. 14331; and see *Henderson*, 1776, 2 Ross' L. C. 74; *Douglas* 5 Bro. Supp. 587; *M'Ghie*, 1827, 5 S. 758). In an old case (*Lady Lamertoun*, 1680, Mor. 14309) an instrument of sasine was sustained, there being no question of competition involved, although it did not set forth the precept of sasine; but practice established the rule that the precept should be inserted (Bell, *Lect.* i. 654), subject to this, that it was sufficient to insert as much of the precept, if it contained a description of different lands, as related to that part of them in which infeftment was being taken (*Don*, 4 Feb. 1813, F. C.) The testing clause was engrossed *verbatim*, in order to connect the warrant produced as the deed of the granter with the delivery given in pursuance of it (Menzies, 573; and see *Leith Bank*, 1836, 14 S. 332). If the deed containing the precept was sufficiently identified, an error or omission in a reference to it in the instrument was not fatal (*Hamilton*, 1824, 2 S. 640; *Gordon*, 1827, 5 S. 550; *Gordon's Trs.*, 1851, 13 D. 1381; see also *Duke of Argyll*, *supra*). If the person in whose favour infeftment was granted was not the original grantee, but his heir or successor, the connecting writs had also to be specified, or, as was said, deduced (1693, c. 35), although, if the connecting links were deduced, it was decided, in a case of doubtful authority, not to be essential that the instrument should specially bear that they were received by the bailie from the attorney, or delivered to the notary, or read and published to the witnesses (*Scott*, 1781, Mor. 8838; and see *Duff*, 107); and it was unnecessary to deduce the commission authorising a factor to assign an unexhausted precept to which his principal had right (*Proctor*, 1796, Mor. 8871). An instrument of sasine was held invalid which, although it set forth the delivery of the appropriate symbols, did not contain that part of the instrument bearing that heritable state and sasine, real, actual, and corporal possession, had been delivered (*Davidson*, 1827, 6 S. 8; 2 Ross' L. C. 65; and comp. *Lady Lamertoun*, 1682, Mor. 14321). Professor Montgomerie Bell states that it was indispensable that the particular symbols used should be set forth in the instrument (Bell, *Lect.* i. 655). In the case of *Urquhart* (1753, Mor. 9921; *affd.* 1755, 1 Pat. 586), however, an instrument which bore that the usual symbols were delivered was held valid. Professor George Joseph Bell remarks that the judgment in *Urquhart* is not to be relied on absolutely (Bell, *Prin.* 871). The specification of a wrong symbol was fatal to an instrument; and where an instrument of sasine set forth, in narrating the delivery of the lands, that the symbol of stone, instead of earth and stone, was used, it was held null (*Town Council of Brechin*, 1840, 3 D. 216). The appropriate symbols were: for land and its accessories, earth and stone; for salmon-fishings, net and coble; for a mill, when a separate tenement, clap and happer; for teinds, a handful of grass and corn; for annual rent of money, one penny money; for annual rent of victual, a parcel of corn or victual; for right of ferry, an oar and some water; for the right of patronage of a parish church, a psalm-book and the keys of the church; and for houses held burghage when sasine was in favour of an heir, hasp and staple, and sometimes earth and stone as well

as hasp and staple (Bell, *Lect.* i. 655; Menzies, 573; Duff, 100; Ersk. 2. 3. 36). It has already been stated that an infeftment cannot be given to a person unnamed. From the principle of the feudal law which forbids any but persons or corporations to be vassals in land, an infeftment in favour of a firm (e.g. in favour of Robert Muirhead & Company) is inept (*Morrison*, 1818, Hume, 720, 2 Ross' L. C. 24); but one in favour of a named partner of a firm and the other partners of the firm, will operate effectually in favour of the named partner, on the ground that it is equivalent to an infeftment for himself and the other partners (*Denniston*, 1808, Mor. No. 15, App. Tack, 2 Ross' L. C. 23. Note that a firm may hold a lease *socio nomine*—*Denniston, supra*). Besides, as there can be no successive fee in favour of two or more parties constituted at the same time, no valid infeftment can be given to successive fiars, e.g. to A., whom failing B., whom failing, C. But if infeftment is so taken to successive fiars, the inept infeftment in favour of the others after the first will not invalidate the infeftment in his favour, for *utile per inutile non vitiatur* (*Ker*, 1708, 2 Ross' L. C. 25; *Paul*, 1833, 11 S. 292, 2 Ross' L. C. 26). Where a notary by mistake inserted in an instrument of sasine the words *in dimiditate tertie partis* in place of *trium partium*, the words were taken as they stood, so as to limit the right to the half of a third (*Murray*, 1708, 4 Bro. Supp. 701). The object of specifying in the instrument of sasine the hours between which sasine was given was to show that the ceremony was performed by daylight (Bell, *Lect.* i. 656). When infeftment was given in different parcels of land on different days, it was not essential to specify the particular parcels in which infeftment was given each day (*McLean*, 1777, 5 Bro. Supp. 590), and an objection to an instrument of sasine that it had not been taken in daylight (*Arnot*, 1679, Mor. 14332), or that it did not specify whether the time when sasine was taken was before or after noon (*Dennistoun*, 1824, 3 S. 285), was repelled.

Whilst the body of the instrument could be written by anyone (1 Bell, *Lect.* i. 656; see *Dickson*, 1801, M. App. Tailzie, 7), the notarial docquet had to be holograph of the notary public. The omission from the docquet of the statement that the notary was present with the witnesses at the transaction set forth in the instrument was a fatal objection (see *Primrose*, 1612, Mor. 14326; *Macintosh*, 1825, 4 S. 190, 2 Ross' L. C. 75). An immaterial omission from, or a grammatical or a clerical error in, the docquet did not invalidate the instrument (see *McGhie*, 1827, 5 S. 758; *Dickson*, 1829, 7 S. 503). The instrument of sasine required to be signed on each leaf by one notary (1584, c. 4) and two witnesses (*Bishop of Aberdeen*, 1680, Mor. 3011). When the deed consisted of more than one sheet, the pages had to be numbered, and the notarial docquet had to set forth the number of pages of which the deed consisted (Act of Sederunt, 17 January 1756; *Copland*, 1771, Mor. 8686), and each leaf had to be signed by the notary and the witnesses (1686, c. 17; see *Carnegie*, 1796, Mor. 8858). The reason for the signing of each leaf by the witnesses was that they were witnesses to the facts narrated in the instrument,—not simply to the subscription of the notary. When the instrument was written on one sheet it was unnecessary to number the pages or to mention their number in the docquet, and subscription by the notary and the witnesses at the close of the deed was sufficient (*Kirkham*, 1822, 1 S. 423). The witnesses' designations had to be inserted in all cases in the instrument of sasine (1681, c. 5; and see *Stewart*, 2 March 1815, F. C.)

(4) *Registration of Instrument of Sasine*.—After the granting of the feu-charter, symbolical delivery, and the expeding of an instrument of sasine, it

was, as already stated, necessary before 1845, for the completion of a feudal title in the person of the disponee, to secure the registration of the instrument within sixty days of its date in the appropriate Register of Sasines, *i.e.* in the General Register of Sasines at Edinburgh, or in the Particular Register of Sasines for the district within which the lands lay.

The essentials of registration of an instrument of sasine relating to subjects held feu (1617, c. 16; 1672, c. 16; 1686, c. 19; 1693, c. 13; 1693, c. 14; 1696, c. 18; Act of Sederunt, 12 June 1756) before 1845 were as follows: (1) *The entry in the minute-book of the instrument within sixty days of its date, the minute of entry being signed by the keeper of the record (or his depute) and the presenter of the writ* (see *Skelly*, 1774, 5 Bro. Supp. 589).—An instrument of sasine was held as recorded from the time when it was entered in the minute-book, although the engrossing did not take place until after the sixty days (*Maclaine*, 1852, 14 D. 870; *affd.* 1855, 18 D. (H. L.) 44; *Beaumont*, 1716, Mor. 13571; *Dunbar*, 1790, Mor. 8799): and if more than one instrument of sasine, all affecting the same subjects, were lodged at the same time, the one first entered in the minute-book was preferred (*Douglas*, 1835, 13 S. 505), in the absence of a clause to the effect that they were to be ranked *pari passu* (*Bell*, *Lect.* i. 669). Besides, when instruments of sasine were entered in the minute-book, and not transcribed into the register in the order of the minute-book, the preference depended on the minute-book (*Maclaine*, *supra*; and see *Cardross*, 1678, Mor. 13554; *Earl of Mar*, 1684, Mor. 13557; *Drummond*, 24 June 1809, F. C.; *Adam*, 19 June 1810, F. C.). The rule for computing the time within which an instrument of sasine could be recorded was by days, counting from midnight to midnight, and excluding the day on which the act of delivery was done, as the *terminus a quo* (*Lindsay*, 1844, 6 D. 771). When several sasines were presented by the same person at the same time, it was not necessary to sign the minute-book after the entry of each (*Maclaine*, *supra*). A discrepancy between the entry in the minute-book and the register was not fatal (*Maclaine*, *supra*). (2) *Transcription of the instrument of sasine ad longum in the General Register of Sasines or in the Particular Register of Sasines applicable to the lands contained in it*.—Any essential error in the record (*Grey*, 1790, Mor. 8796; *Macqueen*, 1823, 2 S. 637; *Stewart*, 1827, 5 S. 383; *Dennistoun*, 1824, 3 S. 285), or an erasure or other vitiation, not authenticated, in a material word or clause in the record, was fatal to the validity of the recording of the instrument (*Drummond*, 24 June 1809, F. C.; and *comp. Adam*, 19 June 1810, F. C.; *Gibson-Craig*, 1838, 16 S. 1332). With regard to erasures not authenticated in instruments of sasine (*Anderson*, 1828, 6 S. 463), the common law was applicable (*McMillan* 1831, 9 S. 551; *Innes*, 1827, 5 S. 559; *affd.* 1827, 2 W. & S. 637; *Smith*, 1835, 13 S. 461; *affd.* 1840, 1 Rob. App. 173; and see *Howden*, 1835, 13 S. 1097; *Morton*, 1828, 7 S. 172; *affd.* 1830, 4 W. & S. 379; *Bell*, *Lect.* i. 671), until the passing of the Act 6 & 7 Will. iv. c. 33, which enacted that no challenge of any instruments of sasine or resignation *ad remanentium* (exclusive, however, of instruments of sasine or resignation and sasine *propriis manibus*) should receive effect either by reduction or exception, on the ground that any part of the instrument was written on an erasure, unless it should be averred and proved that such erasure had been made for the purposes of fraud, or the record thereof was not conformable to the instrument as presented for registration. In one case, where the day of the month and the year of the king's reign were written in a marginal note not authenticated, objection on that ground to the validity of the instrument was repelled (*Maclaine*, *supra*). Although the rule was that the record could not be altered after the expiry of the sixty days (*Dundas*, 1824, 3 S.



400), the Court has allowed an omission in one or two cases to be supplied under the reservation of the rights of third parties (*Duke of Montrose, Petr.*, 1846, 8 D. 822; see also *Tait, Petr.*, 1822, 1 S. 241), but the proper remedy for an error or other defect in the recording, as in the case of instrument of sasine itself, was the expeding and recording of a new instrument (*Haig*, 1857, 19 D. 449; *Kibbles*, 1830, 9 S. 233; affd. 1831, 5 W. & S. 553; and see *Wilson*, 1818, Hume, 718; *Bell, Lect. i.* 671). (3) *The certificate of registration on the instrument of sasine by the keeper of the register.*—This certificate bore the date of presentment and the fact of registration, and referred to the book and the pages of the book in which the instrument was engrossed. In the case of *Gibson-Craig* (1838, 16 S. 1332; affd. 1841, 2 Rob. 446), where an erasure occurred in the attestation as well as an error in its date, the minute-book and register corresponding, the instrument was held sufficient. Where the keeper had omitted to sign the certificate, the Court authorised his successor in office to sign the same (*Young, Petr.*, 1749, Mor. 13575; *Herries, Petr.*, 1750, Mor. 13575; and see *Ballantine, Petr.*, 1740, Mor. 13575).

II. *CHARTER AND INFESTMENT AFTER THE INFESTMENT ACT, 1845, TILL THE LANDS TRANSFERENCE ACT, 1847.*—The only alteration made by the Infestment Act, 1845, on the form of the feu-charter formerly in use was in the precept of sasine. The Act enacted (s. 5) that in all deeds containing a precept of sasine such precept might be in the form of Sched. (A), which is as follows:—

Moreover I desire any notary public to whom these presents may be presented, to give to the said *A. B.*, or his foresaids, sasine [or liferent sasine, or sasine in liferent and fee respectively, as the case may be] of the lands and others above disposed [if the deed be granted under the burden of a real lien or servitude, or any other incumbrance, condition, or qualification of the right, or under redemption, then there will be added here, “but always under the burden of the real lien,” etc. (as the case may be) before specified].—In witness whereof, etc. [here insert a testing clause in legal form].

In addition to supplying a new form of precept of sasine, the Act enacted: (1) that from and after 1 October 1845 it should not be necessary to proceed to the lands in which sasine was to be given, or to perform any act of infestment thereon, but that sasine should be effectually given therein and infestment obtained by producing to a notary public the warrants of sasine and relative writs as then in use to be produced at taking infestment, and by expeding and recording in the General Register of Sasines, or the Particular Register of Sasines applicable to the lands contained in the warrant of infestment, an instrument of sasine, setting forth that sasine had been given on the lands, and subscribed by the notary public and witnesses, according to the form Sched. (B) annexed to the Act (s. 1); (2) that such form of infestment should be effectual whether the lands lay contiguous or discontinuous, or were held by the same or by different titles, or of one or more superiors, or whether the deed entitling the party to obtain infestment was dated prior or subsequent to the Act, or whether the precept of sasine therein was in the form theretofore in use, or in the form authorised by the Act (s. 1); (3) that such instrument of sasine, on being recorded in the manner theretofore in use with regard to instruments of sasine, should in all respects have the same effect as if sasine had been taken and an instrument of sasine duly recorded according to the law and practice theretofore in use (s. 2); (4) that every such instrument of sasine might be competently and effectually recorded at any time during the life of the party in whose favour such instrument had been expedited, but that the date



fined the privilege of registration at any time within the life of the parties in whose favour they were expedite to instruments of sasine in the form prescribed by the Act (see Menzies, 591). The words of sec. 5 also seem to have made it incompetent to expedite an instrument of sasine in the old form on a charter containing a precept in the form given in the Act (see *ib.* 592).

III. *CHARTER AND INFECTMENT AFTER THE LANDS TRANSFERENCE ACT, 1847, TILL THE TITLES TO LAND (SCOTLAND) ACT, 1858.*—The Lands Transference Act, 1847, which took effect from and after 30 September 1847 (s. 23), made it lawful, but not imperative, to insert in dispositions and conveyances, and other deeds and instruments necessary for the transmission of lands and other heritages not held burgage, short statutory forms of the principal clauses, instead of the longer forms then in use. The provisions of this Statute have been fully referred to in the article DISPOSITION, to which reference is made.

It is apparent from its provisions that the Act of 1847 had in view primarily the form of a disposition as opposed to a feu-charter or other original feu-right; but appended to Sched. (A) there is a note to the effect that whilst the clauses given in the schedule were assumed as occurring in a disposition, they might be used in other deeds and instruments, and that in the event of its being necessary to omit, vary, or qualify any one or more of them, this might be done, and the other clauses might be retained.

On account of the provisions of the Act, the form of the charter which came into use after 1847 was shorter than that formerly in use. After 1847 the form of the feu-charter was:—

I, A., heritable proprietor of the lands and others after described, in consideration of the sum of £  
 instantly paid to me, and of the feued Clause.  
 hereby stipulated to be annually paid [if any other consideration, onerous or gratuitous, exists, here state it], do hereby SELL, ALIENATE, and in feued Clause.  
 feued-farm DISPOSE to and in favour of B., and his heirs and successors  
 whomsoever, heritably and irredeemably, ALL and WHOLE [here describe the lands, etc., intended to be conveyed, and insert all real burdens, restrictions, reservations, and qualifications of the grant], with entry at the term of Whitsunday [or Martinmas] next [or whatever the stipulation as to the term of entry, here state it]; To BE HOLDEN, the said lands and others, of and  
 under me and my heirs and successors in feued-farm, fee, and heritage for ever, FOR PAYMENT to us by the said B. and his foresaids of the sum of £  
 sterling in name of feued-duty, at two terms in the year, Martinmas and Whitsunday, by equal portions, beginning the first term's payment thereof at Martinmas next for the half-year preceding, and so forth, at the said two terms in the year, in all time thereafter, with the lawful interest of each termly payment from the date on which the same shall have fallen due, until payment thereof [if any other payment or delivery has been stipulated, here insert it]; and doubling the said feued-duty the first year of the entry of every heir [and if so stipulated, say, or singular successor] to the said lands: And I ASSIGN THE WRITS, but to the effect only of maintaining and defending the right of the said B. in the said subjects, and for that purpose I oblige myself to make the same forthcoming on all necessary occasions, according to an inventory thereof subscribed by me as relative [or annexed] hereto, and that on the receipts of the said B. or his foresaids, and an obligation to redeliver the same within a fixed period, under a penalty of £  
 sterling: And I ASSIGN the RENTS: And I bind myself to FREE and RELIEVE the said B. and his foresaids of all feued-duties, casualties, and public burdens: And I grant WARRANDICE: And I consent to registration hereof for preservation: MOREOVER, I desire any notary public to whom these presents may be presented, to give to the said B. and his foresaids sasine of the lands and others above disposed [if there are Sasine.

1. Narrative Clause.  
 2. Dispositive Clause.  
 3. Term of Entry.  
 4. Tenendas.  
 5. Ralendo.  
 6. Assignment of Writs.  
 7. Assignment of Rents.  
 8. Public Burdens.  
 9. Warrandice.  
 10. Clause of Registration.  
 11. Precept of Sasine.



12. Testing Clause. *restrictions, etc., say*], but always with and under the real burdens, restrictions, qualifications, and reservations above specified [*or such of them as are applicable*].—IN WITNESS WHEREOF, these presents, written upon this and the preceding pages of stamped vellum by C., clerk to D., are subscribed by me at , the day of , one thousand eight hundred and years, before these witnesses, E. and F.

(*Jurid. Styles*, 4th ed., vol. i. 18.)

The Lands Transference Act, 1847, made no change as regards infeftment.

IV. *CHARTER AND INFESTMENT AFTER THE TITLES TO LAND (SCOTLAND) ACT, 1858, TILL THE COMMENCEMENT OF THE TITLES TO LAND CONSOLIDATION (SCOTLAND) ACT, 1868.*—The Titles to Land Act, 1858 (21 & 22 Vict. c. 76), whilst providing that nothing contained in it should prevent the constitution, transmission, or completion of land-rights by the forms in use prior to the passing of the Act (s. 20), contained certain important provisions as to both the form of deeds of conveyance and infeftment thereunder. The provisions, so far as relevant to the present article, may be mentioned in the order in which they are set forth in the Act. The Act provided: (1) that from and after 1st October 1858 it should not be necessary to expedite and record an instrument of sasine on any conveyance of lands, but that it should be sufficient for the person or persons in whose favour the conveyance was granted, instead of recording such instrument of sasine, to record the conveyance itself, with a warrant of registration thereon, in the form of Sched. (A) of the Act, in his or their favour, in the Register of Sasines applicable to the lands therein contained (s. 1); (2) that where a conveyance of lands was contained in a deed granted for further purposes and objects, such as a marriage contract, deed of trust, or deed of settlement, or where a deed conveyed separate lands, or separate interests in the same lands, to the same or different persons, it should not be necessary to record the whole of such deed, but that it should be sufficient to expedite and record in the appropriate Register of Sasines a notarial instrument setting forth generally the nature of the deed, and containing at length, in the case of a deed granted for further purposes and objects, those portions of the deed by which the lands were conveyed, and by which real burdens, conditions, or limitations were imposed, and in the case of a deed conveying separate lands, or separate interests in the same lands, to the same or different persons, the part or parts of the deed by which such particular lands were conveyed to the person or persons in whose favour the notarial instrument was expedite, and the part of the deed which specified the nature and extent of the right and interest of such person or persons, with the real burdens, conditions, and limitations, if any (s. 2); (3) that immediately before the testing clause of any conveyance it should be competent to insert a clause of direction in the form of Sched. (C) in the Act, specifying the part or parts of the conveyance which the granter desired to be recorded in the Register of Sasines; and that where such clause was inserted the keeper of the register should record such part or parts only, together with the clause of direction and the testing clause, and that the recording of such part or parts of the conveyance, together with the clause of direction and the testing clause and the warrant of registration, should have the same legal effect as if a notarial instrument containing such part or parts of the conveyance had been duly expedite and recorded in favour of the party on whose behalf the conveyance was presented (s. 3). Notwithstanding a clause of direction, it was competent by the Act to record, with warrant of

registration, the whole deed; and if the deed containing such a clause of direction was granted for further purposes and objects than the conveyance of land, or conveyed separate lands or separate interests in the same lands, a notarial instrument could be expedé and recorded, but it was declared that no part or parts of the conveyance directed to be recorded should be omitted from the notarial instrument (s. 3; also 23 & 24 Vict. c. 143, s. 25). The Act also provided: (4) that it should not be necessary to insert in any conveyance a precept of sasine or warrant for infeftment (s. 5); (5) that where a party should have granted or should grant a general conveyance of his lands, whether by deed *mortis causa* or *inter vivos*, it should be competent to the disponee under such conveyance, or to any other party who should have acquired right to such conveyance, in whole or part, by service, assignation, adjudication, or otherwise, to complete his title by expédé and recording a notarial instrument in the form of Sched. (H), but under the provision that where such notarial instrument should be expedé by a party other than the original disponee under such general disposition, the instrument should set forth the title or series of titles by which the party in whose favour the instrument was expedé acquired right to such conveyance, and the nature and extent of his right (s. 12; see *Smith*, 1869, 8 M. 204); (6) that where lands had been particularly described in any prior conveyance or other writ, duly recorded in the appropriate Register of Sasines, it should not be necessary in any subsequent conveyance or writ containing or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, but that it should be sufficient to describe them by reference in the way afterwards to be detailed (see s. 15 and s. 34 of 23 & 24 Vict. c. 143; and as to use of general name for several lands, s. 16); (7) that all conveyances, with warrants of registration, and all notarial instruments authorised by the Act to be recorded in the Register of Sasines, might be recorded at any time during the life of the party on whose behalf the same should be presented for registration in the same manner as instruments of sasine were recorded, and that the date of entry in the minute-book should be held to be the date of registration, and that the date of registration should be equivalent to the date of registration of instruments of sasine according to the law and practice then existing (21 & 22 Vict. c. 76, s. 19); (8) that extracts of all conveyances, warrants of registration, and notarial instruments recorded in terms of the Act should make faith in all cases except where the recorded writ should be offered to be improven (s. 19); (9) that in case of any error or defect in any notarial instrument expedé or to be expedé in virtue of the Act, or of the Act 8 & 9 Vict. c. 35, or in the recording of any such instrument, or of any conveyance or warrant of registration recorded or to be recorded in the Register of Sasines in virtue of the Act it should be competent of new to make and record a notarial instrument, or of new to record the conveyance with the original or a new warrant of registration, and that such notarial instrument so expedé and recorded, or such conveyance so of new recorded, with the original, or a new warrant of registration, as the case might require, should, from the date of recording thereof, have the same effect as if no previous notarial instrument had been expedé or recorded, or as if such conveyance and original warrant of registration had not been previously recorded (s. 31, as altered by s. 35 of 23 & 24 Vict. c. 143); and (10) that the Act of 6 & 7 Will. IV. c. 33 should extend and be applicable to notarial instruments authorised by the Act, and to notarial instruments expedé and to be expedé under the Act 8 & 9 Vict. c. 35 (s. 33, as corrected by s. 37 of 23 & 24 Vict. c. 143).

With regard to the form of the charter, the Titles to Land Act, 1858, as the provisions referred to show, made it unnecessary to insert a precept of sasine, and allowed, in place of a full description of the lands, a short description of them in statutory form.

The changes effected by the Act in constituting the feudal relationship, or in taking infeftment under a charter, were important. If the charter contained a particular description of the lands, or a description of them by reference in the form allowed by the Act, and whether it did or did not contain a precept of sasine in the form in use prior to the Infeftment Act, 1845, or in the form introduced by that Act, the disponee could take infeftment by recording it, with a warrant of registration in his favour. If the feu was contained in a deed granted for further purposes and objects, or if the deed containing the feu conveyed separate lands or separate interests in the same lands to the same or different persons, the disponee, in any of these cases, provided the lands feued to him were described sufficiently, could complete his title either by recording the whole of the deed containing the lands feued; or, if such deed contained a clause of direction, by recording such parts of the deed as related to the lands feued; or, whether or not such deed contained a clause of direction, by expeding and recording a notarial instrument in the form of Sched. (B) of the Act. In all cases where a charter (or other conveyance) contained a precept of sasine applicable to the lands, the disponee could also complete his title by having expedite and recorded an instrument of sasine, which, if the precept was in the form in use prior to the Infeftment Act, 1845, could be in the form given in the Act, or in the long form in use prior to the Act, but which, if the precept of sasine was in the form introduced by the Act, had to be in the form given in the Act. If the deed containing the feu only described the lands disposed in feu in general terms, *e.g.* "all the lands belonging to me," then whether it did or did not contain a precept of sasine, the disponee under it could not complete his title *de plano* by recording the deed with a warrant of registration; but he could either expedite and record a notarial instrument in terms of Sched. (H) of the Titles to Land Act, 1858, or, if it contained a precept of sasine, expedite and record an instrument of sasine. Whether a notarial instrument or an instrument of sasine was expedite, it had to narrate the disposer's infeftment in the lands disposed, and deduce the deed containing the general conveyance of them. Regarding what has been above stated about registration, it has to be observed that the charter, the notarial instrument, and, if in the form introduced by the Infeftment Act, 1845, the instrument of sasine, could be recorded at any time within the life of the party on whose behalf the same were presented for registration, and that they might be recorded either in the General Register of Sasines or in the appropriate Particular Register of Sasines. When an instrument of sasine in the form in use prior to 1845 was expedite, the expeding had to be preceded by symbolical delivery, and the instrument had to be recorded within sixty days of its date.

The Titles to Land Act, 1858, did not apply to subjects held burgage, but its provisions were extended to these subjects by the Titles to Land Act, 1860 (23 & 24 Vict. c. 143). The latter Act made various amendments on the Act of 1858, but the only point of which notice may be taken here is that the Act of 1860 enacted that, in the absence of a reference in a warrant of registration to a clause of direction in a deed, the deed should be engrossed in the register as if it had contained no clause of direction, and introduced a form of warrant of registration applicable to cases in which the clause of direction was to be acted on (23 & 24 Vict. c. 143, s. 25).



V. *CHARTER AND INFESTMENT IN THEIR PRESENT FORM.*—The feu-charter and infestment in their present form are chiefly regulated by the Titles to Land Consolidation Act, 1868, and the Conveyancing Act, 1874. The former of these Acts was amended by the Titles to Land Consolidation Amendment Act, 1869 (32 & 33 Vict. c. 116). The amendments consisted of the repeal of secs. 22, 24, 62, 97, 118, 119, 130, and 141, and the substitution therefor of amended sections; and by sec. 10 of the Act of 1869 it is enacted that the amended sections shall be held to form part of the Act of 1868, and may be printed as forming portions thereof, in place of the several sections which it repealed. Sec. 4 of the Act of 1868 wholly repealed, *inter alia*, the following Acts: (1) Lands Transference Act, 1847; (2) Titles to Land Act, 1858; and (3) Titles to Land Burgage Acts, 1847 and 1860.

The form (*Jurid. Styles*, vol. i. 11; Hendry, *Styles*, 15) of the feu-charter which is now in use is as follows:—

I, A. [full name and designation of superior], heritable proprietor of the subjects hereinafter disposed, IN CONSIDERATION of the sum of £ sterling, instantly paid to me by B. [full name and designation of vassal], of which I hereby acknowledge the receipt, and of the feu-duty and other prestations after specified [if any other consideration, onerous or gratuitous, exists, here state it], Do hereby SELL and in feu-farm DISPOSE to and in favour of the said B., and his heirs and assignees whomsoever, heritably and irredeemably, ALL and WHOLE [here describe the subjects intended to be conveyed, adding]—Together with my whole right, title, and interest in the dominium utile of said subjects [and if there are any reservations, real burdens, conditions, etc., under which the charter is to be granted, say]—But always with and under the reservations, real burdens, conditions, provisions, restrictions, and qualifications (or such of these as may be applicable) following, viz. [here insert them, and add], All which reservations, burdens, conditions, etc. (as the case may be) are hereby declared real and preferable burdens upon and affecting the said subjects hereby disposed, and are appointed to be inserted in any notarial instrument to follow hereon, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, or other writs, of or relating to the said subjects, or any part thereof, otherwise such deeds, decrees, instruments, and writs shall be void and null : WITH ENTRY at : 3. Date of Entry.

TO BE HOLDEN the said subjects of and under me and my heirs and successors, as immediate lawful superiors thereof, in feu-farm, fee, and heritage for ever : FOR PAYMENT to me and my foresaids by the said B. and his foresaids of the sum of £ sterling yearly, in name of feu-duty, at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first term's payment thereof at for the half-year preceding, and the next term's payment thereof at following, and so forth at the said two terms in the year in all time thereafter, with a fifth part more of each term's payment of liquidate penalty in case of failure in the punctual payment thereof, and interest at the rate of five per centum per annum of the said feu-duty from the respective terms of payment during the non-payment of the same [if any permanent increase of the feu-duty, or any fixed sums payable at fixed intervals have been stipulated for, here insert them] : AND I assign the writs, but to the effect only of maintaining and defending the right of the said B. and his foresaids in the subjects hereby disposed ; and for that purpose I oblige myself and my foresaids to make the same, to the extent of a legal process, forthcoming to the said B. and his foresaids, at their expense, on all necessary occasions, and that on a receipt and obligation to re-deliver the same within a reasonable time, and under a suitable penalty : AND I assign the writs : AND I bind myself and my foresaids to free and relieve the said B. and his foresaids of all feu-duties and casualties, or sums of money in lieu thereof, payable to my superiors now and in all time coming, and of all public and parochial burdens exigible prior to said term of entry : 10. Clause of Warrandice.

AND I grant warrandice ; AND I consent to registration hereof for preserva- 1. Narrative or Indenture Clause.  
2. Dispositive Clause.  
4. *Tenendas*.  
5. *Reddendo*.  
6. Assignment of Writs.  
7. Assignment of Rents.  
8. Obligation to relieve of Public Burdens.  
9. Clause of Warrandice.  
10. Clause of Registration.

11. Testing Clause. tion.—IN WITNESS WHEREOF, these presents, written upon this and the preceding pages of stamped vellum (or paper) by C. [full name and designation], clerk to D. [full name and designation], are subscribed by me at upon the day of in the year One thousand eight hundred and before these witnesses, E. [full name and designation] and F. (also full name and designation).  
(Signed) E., witness. (Signed) A.  
F., witness.

It is now proposed to deal with the separate clauses of the feu-charter.

(I.) NARRATIVE CLAUSE.—This clause sets forth (1) the names and designations of the parties to the deed, and (2) the cause of granting. The full Christian names and surnames of the disponents and the disponees ought to be set forth in the deed; but the rule is that it is sufficient if they are identified in the deed, although neither their abodes nor their designations are stated, the maxim *dummodo constet de persona* being applicable to such cases (*Milne*, 1665, Mor. 11657; *Scottish Union Insurance Co.*, 1836, 14 S. 667; *Guthrie*, 1833, 11 S. 465).

The Stamp Act, 1891 (54 & 55 Vict. c. 39, s. 5), requires that all facts and circumstances affecting the liability of any instrument to duty, or the amount of the duty with which any instrument is chargeable, shall be fully and truly set forth; and enacts that every person who, with intent to defraud Her Majesty, (a) executes any instrument in which all the facts and circumstances are not fully and truly set forth, or (b), being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the facts and circumstances, shall incur a fine of ten pounds.

The expression "heritable proprietor" implies that the disponent is infest in the lands disposed (*Duff*, 59; *Bell, Lect.* vol. i. 580), and the practice is to have the title of the grantor of a feu-charter or a disposition completed prior to a grant by him. But infestment in virtue of a feu-charter or a disposition granted by a person having only a personal title, or even no title, will be validated *accretionem* by his subsequent infestment, even although it takes place subsequent to his donee's death, for accretion operates whether a disponent simply completes his title or first acquires and then completes his title subsequent to the date of the grant made by him (see article ACCRETION). If the true owner is a consentor to a conveyance granted by a person who has an interest (*e.g.* a liferenter) (*Moncrieff*, 1691, 2 Bro. Supp. 129; *Sorley's Trs.*, 1832, 10 S. 319, 1 Ross' L. C. 41), or even no interest (*Ersk.* 2. 3. 21; *Buchan*, 1739, Mor. 6528, 1 Ross' L. C. 33; *Mounsey*, 1808, Hume, 237; *Stirling*, 1630, Hume, 238), the conveyance will be effectual; but if a mere consentor to a conveyance subsequently acquires rights to the land in the conveyance, his consent will not import a conveyance of such rights, unless he has expressly bound himself in absolute warrandice, his consent being construed with reference only to the rights vested in him at the time of consenting, and there being no implied warrandice against him (*Forbes*, 1668, Mor. 7759; *Stuart*, 1681, Mor. 7762; *Ersk.* 2. 7. 4; 1 Ross' L. C. 33 *et seq.*).

(II.) DISPOSITIVE CLAUSE.—The dispositive clause is the ruling clause in a conveyance of lands. It contains (a) the appropriate words of conveyance; (b) the name and designation, if not already given in the narrative clause, of the donee and the agreed-on destination; (c) a description of the lands disposed; and (d) the reservations, burdens, conditions, restrictions, and qualifications of the grant.

As to the appropriate words of conveyance, it is usual for the disponent,

in a feu-charter, to *sell and in feu (or blench) farm, dispoine*, if the charter is for an onerous consideration, and to *give, grant, and in feu (or blench) farm, dispoine*, if the charter is not for an onerous consideration (*Jurid. Styles*, vol. i. 11, 15). In a disposition, on the other hand, the disposer usually *sells and dispoines* when the disposition is for an onerous consideration, and *gives, grants, and dispoines* when the disposition is not for an onerous consideration (*Jurid. Styles*, vol. i. 90, 102).

Prior to the Titles to Land Consolidation Act, 1868, the word "dispoine" was essential in conveyances of heritage *mortis causa*, and no expression of intention to convey in a testamentary deed, not expressing by the use of the word "dispoine" a present act of alienation, afforded even a good ground of action against the heir of the testator to have him ordained to denude (*Kirkpatrick*, 1873, 11 M. 551; *affd.* 1874, 1 R. (H. L.) 37; and see *Simpson*, 1752, 5 Bro. Supp. 794, 1 Ross' L. C. 1, Elehies, *vocc* "Testament," No. 12; *Montgomery*, 1796, 1 Ross' L. C. 7; Bell, *Folio Cases*, 203; *Duke of Hamilton*, 1779, 1 Ross' L. C. 10; *Stewart*, 1803, Hume, 880; *Glassford's Trustee*, 1864, 2 M. 1317). As illustrating this rule, the case of *Kirkpatrick* may be cited. There a lady, who died in 1867, did by deed "give, grant, assign, convey, and make over" her estate, heritable and moveable, to testamentary trustees; and it was held by the Court of Session and the House of Lords that the deed was ineffectual as a conveyance of heritage in consequence of the omission of the *vox signata* "dispoine."

By sec. 20 of the Act of 1868 it was, however, made competent, after the commencement of the Act, to any owner of lands to settle the succession to the same in the event of his death, not only by conveyance *de presenti*, according to the law and practice then existing, but likewise by testamentary or *mortis causa* deeds or writings; and it was declared that no testamentary or *mortis causa* deed or writing purporting to convey or bequeath lands which should have been granted by any person alive at the commencement of the Act, or which should be granted by any person after the commencement of the Act, should be held to be invalid as a settlement of the lands to which such deed or writing applied, on the ground that the granter had not used with reference to such lands the word "dispoine," or other word or words importing a conveyance *de presenti*. Whilst in virtue of this provision of the Act of 1868 a testamentary writ disposing of heritage may be in the form of a testament as opposed to a *mortis causa* deed (see L. P. in *Grant*, 1893, 20 R. at p. 406), and need not contain direct words of conveyance (*M'Leod's Trustees*, 1875, 2 R. 481; *Hardy's Trustees*, 1871, 9 M. 736; *M'Leod's Trustees*, 1883, 10 R. 1056), or words either naming the lands (*ib.*), or even descriptive of heritage as distinguished from moveables (*Forsyth*, 1887, 15 R. 172), yet words primarily applicable to moveables will not be construed to comprehend heritage unless the context requires it (*Pitcairn*, 1870, 8 M. 604; *Forsyth, supra*; *Urquhart*, 1879, 6 R. 1026), and the import of equivocal words will be determined by the context (*Ford's Trustee*, 1884, 11 R. 1129; see also *Studd*, 1880, 8 R. 249; *affd.* 1883, 10 R. (H. L.) 53; *Oag's Curator*, 1885, 12 R. 1162; *Campbell*, 1887, 15 R. 103; *Farquharson*, 1883, 10 R. 1253; *Connell's Trustees*, 1872, 10 M. 627; *Edmond's Trustees*, 1873, 11 M. 348; *Farquhar*, 1875, 3 R. 71; *Pringle and Others*, 1877, 15 S. L. R. 89). One effect of the provision of the Act of 1868 is that a testamentary writing relating to heritage may be validly executed in the forms allowed by 24 & 25 Vict. c. 114, with respect to testamentary deeds of personal estate (*Connell's Trustees, supra*; and see *Brown and Others*, 1882, 20 S. L. R. 70).



The general opinion was and is that the word "dispone" was indispensable in an *inter vivos* conveyance of land, coming into operation before the passing (7 August 1874) of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94; see Menzies, 538; Bell, *Lect.* i. 583 *et seq.*). Sec. 27 of the Conveyancing Act, 1874, provides, however, that "it shall not be competent to object to the validity of any deed or writing as a conveyance of heritage coming into operation after the passing of this Act on the ground that it does not contain the word 'dispone,' provided it contains any other word or words importing conveyance or transference, or present intention to convey or transfer." Professor Montgomerie Bell, speaking of the absence of the word "dispone" from an onerous *inter vivos* conveyance of land under the law as it was prior to the passing of the Conveyancing Act, 1874, says: "Without that word it may not be effectual as a direct means of divesting the old and investing the new proprietor; but, at all events, it will be effectual as an obligation, and, if necessary, the foundation of a suit at the new proprietor's instance for obtaining a judicial conveyance and investiture,—that is, an adjudication in implement" (Bell, *Lect.* i. 585; and see *Reid*, 1838, 16 S. 363).

After the words of alienation come the name of the grantee and the agreed-on destination. The conveyance in a charter or disposition is generally in favour of the grantee, and his heirs and assignees whomsoever (*Jurid. Styles*, vol. i. 11, 90). But a conveyance to the donee alone is equivalent to a conveyance in favour of the donee and his heirs, or his heirs and assignees; for, fees being now hereditary and transmissible, the words "heirs and assignees" are not essential to enable the donee to transmit to his heirs, or to convey to a stranger. Accordingly, if a conveyance of heritage is granted in favour of a donee, then on his death, and in the event of his not having disposed the heritage by *inter vivos* or testamentary deed, his heir-at-law in heritage succeeds to it, as is the case when the conveyance is in favour of the donee and his heirs, or his heirs and assignees (Duff, 61; Stair, 3. 5. 5–6; Ersk. 2. 3. 4; 3. 10. 1). Nor does the absence from the dispositive clause of mention of the donee's assignees prevent him from assigning his right and interest in the lands. Prior to the period when proprietors of land had power to dispoise their fees to a stranger, it was held that a charter in favour of a donee and his assignees enabled the donee to assign his right to the charter at any time before he had taken infeftment (Stair, 2. 4. 32; Ersk. 2. 7. 5; Bell, *Lect.* i. 587; *Carnegie*, 1663, Mor. 10375). Since, however, the passing of the Act 20 Geo. II. c. 50, all clauses *de non alienando sine consensu superiorum* in a charter have been rendered null. Notwithstanding that Act, a dispoiser sometimes stipulates for an exclusion of the donee's assignees before infeftment, and inserts a declaration that the conveyance shall not be a valid warrant for infeftment after the expiry of a certain date (see *Jurid. Styles*, vol. i. 20). Such exclusion and declaration, it is thought, are valid. Instead of the destination in a charter or a disposition being to the donee simply, or the donee and his heirs and assignees, it may be to the donee and a special series of heirs, *e.g.* his heirs-male, or to the donee, whom failing, to another, or to one person in liferent and another in fee, and when there is such a destination, and the donee dies intestate, the lands pass to the substitute, who may or may not be the heir-at-law in heritage of the donee. Whatever the destination is, the lands do not, in the absence of a clause of return (Ersk. 3. 10. 1), revert to the dispoiser. Should the destination be, for instance, to the donee and his heirs-male, and the donee die without having disposed of the lands and without leaving an

heir-male, his nearest heir in heritage will succeed to them, and the Crown, as *ultimus hæres*, takes the lands only on the failure of an heir specially called and of an heir in one of the three lines of succession,—lineal descent, collateral succession, and ascending line (Bell, *Prin.* 1669). This right to take on the part of the Crown is a caducary right, not a right of succession (*Halero*, 1626, Mor. 1348; *Tenant*, 1638, Mor. 14897), and accordingly it was held that where a bastard had died unmarried before a provision in a trust deed had vested in him, the Crown could not take it as a conditional institute, although the provision was destined to the bastard and his heirs and assignees (*Torrie*, 1832, 10 S. 597). It is the practice to close the words of conveyance in a feu-charter or disposition (*Jurid. Styles*, vol. i. 60) with the words “heritably and irredeemably”; but the words are unnecessary (Bell, *Lect.* i. 588).

After the destination in a charter or a disposition is the description of the subjects conveyed. “There is no invariable rule,” says Menzies (Menzies, 541), “as to the manner in which the lands must be described. Only this is indispensable, that means be furnished for ascertaining with certainty the lands or other subjects conveyed” (see *Smith*, 1869, 8 M. 204; *Wallace*, 1742, Mor. 6919; *Belches*, 21 Jan. 1815, F. C.). Erskine remarks of the dispositive clause: “Here the grantee must be described by his name and designation; and also the particular subject disposed by its special boundaries or march-stones, or by its situation or other characters, so that it may be distinguished from all others; for the conveyance of an uncertain subject is inept and ineffectual” (Ersk. 2. 3. 23). “The great point,” says Professor Montgomerie Bell, in speaking of descriptions, “is to secure that the description shall embrace everything intended to be disposed; that it shall not contain anything not intended to be disposed: and that the subjects disposed shall be capable of clear and absolute identification” (Bell, *Lect.* i. 588).

Descriptions may be divided into six classes: (1) general descriptions; (2) particular descriptions; (3) descriptions by statutory reference; (4) descriptions by general name, in terms of sec. 13 of the Titles to Land Consolidation Act, 1868; (5) descriptions in general terms: and (6) descriptions by reference, not in statutory form.

General descriptions consist simply of the name of the lands, without any specification of measurement or boundaries (Menzies, 541). They are appropriate to the conveyances of old estates which have not been subdivided (*ib.*), or of lands which have been erected into a barony (*ib.*; Bell, *Lect.* i. 589). On the principle that the conveyance of a barony comprehends every component part of it, whether specified or not, it was held that an infeftment in the barony of Lochoy comprehended as a part of it, a burgh of barony, without its being specified (*Argyle*, 1668, Mor. 9631).

In a particular description, the lands are described often by boundaries, not infrequently by measurement and boundaries, with or without reference to a plan, and the parish and the county in which the lands lie are invariably stated. Often in a charter or a disposition there is a general description, followed by an enumeration of particulars. Where the description was of “the whole mains,” containing, according to the dispositive clause, certain lands possessed by persons named, it was held that the conveyance carried only the lands which were possessed by the persons named, and not two other subdivisions of the lands, although they were known as part of the mains (*Murray*, 1634, Mor. 2262; and see *Mansfield*, 1833, 11 S. 813; affd. 1835, 1 S. & M.L. 203). In referring to the case of *Murray*, and to the danger of curtailing a general description by an enumeration of particulars

(in accordance with the principle which restricts what is general to the particulars of which it is said to consist), Professor Menzies observes: "When it may be necessary from any circumstance, therefore, to give the particulars, the enumeration ought to be guarded by such words as leave the conveyance still to depend upon the general description,—as, for instance, *or of whatever other or additional parcels the said lands of A. may consist*" (Menzies, 542; and see Bell, *Lect.* i. 594). The case of *Murray* is an authority in favour of the general rule that a reference to possession in a general description on the part of the disponent or others will tax the grant; but such a reference may not always be construed as taxative. At least, unbroken prescriptive possession of the whole lands, and not simply of the parts said to be possessed by particular persons at the date of the conveyance, may, despite the reference, give a title to the whole lands (see *Gardner*, 1839, 2 D. 185; rev. 1843, 2 Bell's App. 129).

Descriptions by reference in statutory form were first introduced by the Titles to Land Act, 1858 (21 & 22 Vict. c. 76). By sec. 15 of that Act (which applied only to subjects held feu or blench) it was enacted that where lands had been particularly described in any prior conveyance or other writ duly recorded in the appropriate Register of Sasines, it should not be necessary, in any subsequent conveyance or writ containing or referring to the whole or any part of such lands, to repeat the particular description of the lands at length, but that it should be sufficient to specify (1) the leading name or names, or other short distinctive description of the lands conveyed, and (2) the name of the county, and (3) the parish or supposed parish in which the lands lay, and to refer to (4) the particular description contained in the prior conveyance or other writ so recorded, in the manner set forth in Sched. (L) No. I. of the Act. Sec. 15 of the Act of 1858 was repealed by sec. 34 of the Titles to Land Act, 1860 (23 & 24 Vict. c. 143), which made it sufficient in describing lands already particularly described in a conveyance, etc., duly recorded in the appropriate Register of Sasines (1) to specify the name of the county, and, where the lands were held burgage, the name of the burgh and county, in which they were situated, and (2) to refer to the particular description contained in the prior conveyance, etc., so recorded in the manner set forth in Sched. (H), No. 1 of the Act. Both the Titles to Land Act, 1858, and the Titles to Land Act, 1860, were repealed by the Titles to Land Consolidation Act, 1868, and sec. 11 of the Act of 1868 enacted that, in all cases where any lands had been particularly described in any prior conveyance or deed of or relating thereto, recorded in the appropriate Register of Sasines, it should not be necessary in any subsequent conveyance or deed conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands, but that it should be sufficient to specify (1) some leading name or names or some distinctive description of the lands, as contained in the titles thereto, and (2) the name of the county, and, where the lands were held by burgage tenure or by any similar tenure, the name of the burgh and county in which they were situated, and (3) to refer to the particular description of such lands as contained in such prior conveyance or deed so recorded, in or as nearly as might be in the form set forth in Sched. (E) of the Act. Sec. 11 of the Titles to Land Consolidation Act, 1868, has been repealed by sec. 61 of the Conveyancing Act, 1874, which is as follows:—

"Section 11 of 'The Titles to Land Consolidation (Scotland) Act, 1868,' is hereby repealed; and it is provided that in all cases where any lands have been particularly described in any conveyance, deed,



or instrument of or relating thereto, recorded in the appropriate Register of Sasines, it shall not be necessary in any subsequent conveyance, deed, or instrument conveying or referring to the whole or any part of such lands, to repeat the particular description of the lands at length; but it shall be sufficient to specify the name of the county, and, where the lands were held by burgage or by any similar tenure prior to the commencement of this Act, the name of the burgh and county in which the lands are situated, and to refer to the particular description of such lands as contained in such prior conveyance, deed, or instrument so recorded in or as nearly as may be in the form set forth in Sched. O, hereto annexed; and the specification and reference so made in any such subsequent conveyance, deed, or instrument, whether dated prior or subsequent to the commencement of this Act, shall be held to be equivalent to the full insertion of the particular description contained in such prior conveyance, deed, or instrument, and shall have the same effect as if the particular description had been inserted in such subsequent conveyance, deed, or instrument exactly as it is contained in such prior conveyance, deed, or instrument; and it is further provided that it shall not be competent, notwithstanding the terms of the section hereby repealed, or the form of the schedule therein referred to, to object to any specification and reference to any particular description of lands contained in any conveyance, deed, or instrument recorded prior to the commencement of this Act, provided such specification and reference states correctly the name of the county, and, where the lands were held by burgage or by any similar tenure prior to the commencement of this Act, the name of the burgh and county in which the lands are situated, and refers correctly to the prior recorded conveyance, deed, or instrument containing the particular description of such lands; and where any conveyance, deed, or instrument recorded prior to the commencement of this Act contains a specification and reference stating these particulars correctly, the specification and reference so made shall be held to have been equivalent to the full insertion of the particular description contained in the prior conveyance, deed, or instrument referred to, as if the particular description had been inserted in such recorded conveyance, deed, or instrument exactly as it is contained in the prior conveyance, deed, or instrument referred to."

Sched. O is in these terms:—

The lands [or subjects] and others [or the lands delineated and coloured on a copy of the Ordnance Survey map hereto annexed, and signed as relative hereto], [or the lands of A. and others], [or the house No. 10 Street and others], [or other like short description] in the county of [or in the burgh of] and county of [as the case may be], being the lands [or subjects] particularly described in the disposition [or other conveyance, deed, or instrument, as the case may be] granted by C. D., and dated [insert date] and recorded in the [specify Register of Sasines] on the day of [or as particularly described in the instrument of sasine or notarial instrument recorded, etc., or as the case may be. If part only of lands is conveyed, describe such part as above, and add, being part of the lands particularly described, etc., or thus, being the lands [or subjects] as particularly described, etc., with the exception of, and [describe the part excepted]].

From the terms of sec. 61 and Sched. O of the Conveyancing Act, 1874, it will be seen that the essentials in a description by reference are:

- (1) Specification of the name of the county, and, where the lands were held by burgage or by booking prior to the commencement of the

Act, specification of the name of the burgh and county in which the lands are situated.

- (2) Reference to the particular description of the lands, as contained in any conveyance, deed, or instrument of or relating thereto, the writ containing the particular description being identified by a statement of the granter, of the date, of the Register of Sasines in which it is recorded, and of the date of recording.

It is recommended that in all cases of description by reference under sec. 61 of the Conveyancing Act, 1874, there should be some short description given of the subjects, such as is indicated in Sched. O. Even although such a short description may not be essential, yet, if there is a fatal defect in the reference to the recorded writ containing the particular description, it may, apart from the reference, be sufficient to identify the subjects. For instance, in the case of *Murray's Trustee* (1887, 14 R. 856), the description of subjects conveyed in a bond and disposition in security granted by Murray was as follows: "All and Whole that piece of ground fronting Baker Street of Aberdeen, in the burgh and county of Aberdeen, being the subjects and others particularly described in the feu-charter thereof granted by Basil John Fisher, residing now or lately in Aberdeen," and certain other persons named and designed, "in my favour, dated the 6th and 7th, and recorded in the division of the General Register of Sasines applicable to the county of Aberdeen on the      , all days of November 1882." On Murray's estates being sequestrated, the trustee pleaded that the bond was invalid as a heritable security in respect: (1) that, on account of the omission of the date of recording of the feu-charter, the description by reference was invalid; and (2) that, apart from the description by reference, the subjects were not sufficiently identified. Both the Lord Ordinary (Trayner) and the First Division rejected the first of these two contentions, holding that the omission to state the day of the month on which the prior deed was recorded did not invalidate the subsequent deed. The second contention, with which the First Division did not find it necessary to deal, was also rejected by the Lord Ordinary. Assuming that he might have taken too liberal a view of the requirements of the Act as to description by reference, he was of opinion that the trustee's second contention was wrong; and, in holding that there could be no doubt about the identity of the subjects over which the bond was granted, he said: "In the first place, the subjects are described as Murray's property in Baker Street, Aberdeen, and it is not said that Murray had any property in that street except one. In the second place, it is not Murray's property in Baker Street, but the property conveyed to him by certain persons fully designed by a certain deed fully described. I think these things, which appear *ex facie* of the bond, are quite sufficient to identify the subject of the security." Reference may also be made to the case of *Cattanach's Trustee* (1884, 11 R. 972). There a bond and disposition in security bore that certain subjects were "the subjects and others described in the disposition" granted by a person in favour of the granter of the bond, "dated the *twenty-seventh September* and recorded the *twelfth day of November 1880*." The testing clause of the bond bore that it had been signed on the 5th October 1880, and that the words quoted in italics had been written on erasure before it was signed. Considering that such statement was manifestly false as to the words written on erasure, the Court held that these words must be deemed *pro non scripto*, but that, as the description of the subjects was otherwise sufficient, the bond was valid.

Repealing and re-enacting, with verbal alterations, sec. 16 of the

Titles to Land Act, 1858, sec. 13 of the Titles to Land Consolidation Act, 1868, provides that, where several lands are comprehended in one conveyance in favour of the same person or persons, it shall be competent to insert a clause in the conveyance declaring that the whole lands conveyed and therein particularly described shall be designed and known in future by one general name to be therein specified; and that on the conveyance containing such clause, whether dated before or after the commencement of the Act, or on an instrument following thereon, whether dated before or after the commencement of the Act, and containing such particular description and clause, being duly recorded in the appropriate Register of Sasines, it shall be competent in all subsequent conveyances, and deeds, and discharges, of or relating to such several lands, to use the general name specified in such clause as the name of the several lands declared by such clause to be comprehended under it. Such subsequent conveyances, and deeds, and discharges, of or relating to such several lands, under the general name so specified, the section provides, shall be as effectual in all respects as if the same contained a particular description of each of such several lands, exactly as the same is set forth in such recorded conveyance or instrument; provided that reference be made in the terms set forth in Sched. (G) of the Act, in such subsequent conveyance, etc., to a duly recorded conveyance or instrument in which such particular description and clause are contained. The section also enacts that it shall not be necessary in such clause to comprehend under one general name the whole lands contained in the conveyance in which such clause is inserted, but that it shall be competent to comprehend certain lands under one general name, and certain other lands under another general name, it being clearly specified what lands are comprehended under each general name. Sched. (G) of the Act of 1868 is in these terms:—

[After giving the general name or names of the lands and the name of the county, or burgh and county, as the case may be, add] as particularly described in the disposition [or other deed, as the case may be] granted by C. D., and bearing date [here insert date], and recorded in the [specify the Register of Sasines] on the       day of       in the year       , and in which the lands hereby conveyed are declared to be designed and known by the said name of [here insert name], [or, “as particularly described in the instrument (specify instrument) recorded, etc., and in which the lands hereby conveyed are declared,” etc.]. [If part only of lands is conveyed, then follow form for similar case given in Sched. (E).]

By a description in general terms is meant such a description as either of the following: “All and Whole the lands, wherever situated,” belonging to the disponent; or “All and Whole the lands situated” in a certain parish or county belonging to the disponent. Such a description is seldom if ever found either in a feu-charter or in an ordinary *inter vivos* disposition; and, as will be pointed out hereafter, deeds containing descriptions in general terms can only be used as midcouples in making up a feudal title to the lands (*Belches*, 21 Jan. 1815, F. C.; *Graham's Crs.*, 1753, Mor. 49), whereas disponees under deeds containing general descriptions, or particular descriptions, or descriptions by statutory reference, or descriptions by general name, in terms of sec. 13 of the Titles to Land Consolidation Act, 1868, can take infeftment under them *de plano* by recording them, with a warrant of registration, in the appropriate Register of Sasines.

Lands may also be described in a conveyance as the lands contained in a certain deed which, whilst sufficiently identified, is not identified in accordance with the enactments regarding descriptions by reference (see *Bell, Lect. i.* 589). Thus, a proprietor may convey the lands described in a



deed identified by giving the name of the disponent, and the date of its execution. This description will not warrant infeftment *de plano* under the conveyance containing it; but, like a conveyance with a description in general terms, the conveyance can be used as a midcouple in the completion of the disponee's title. In one sense, indeed, the description in question is a description in general terms, but it will be better in the sequel to confine the expression "description in general terms" to those cases in which there is no reference to any deed containing a description of the lands.

Again, the description in a feu-charter or disposition may constitute a *bounding charter* or *bounding title*,—in other words, descriptions are, as regards the limit of the grant either, bounding wholly or partially, or not bounding (see article BOUNDING CHARTER). The peculiarity of a bounding charter is that no amount of possession under it, even for more than the prescriptive period, of a corporeal subject beyond its limits can enable the possessor to vindicate the ownership thereof (see, *e.g.*, *North British Railway*, 1879, 6 R. 640; *Reid*, 1879, 7 R. 84). But although the rule of law is that a person possessing under a bounding title cannot by prescription acquire the ownership of a corporeal subject lying beyond the limits of his title, he may yet, in virtue of his title and prescriptive possession thereon, acquire a right of servitude (*Beaumont*, 1843, 5 D. 1337) or other incorporeal rights, such as salmon-fishings (*Earl of Zetland*, 1873, 11 M. 469; and see *Earl of Dalhousie*, 1865, 3 M. 1168), beyond his express boundaries. On the other hand, a proprietor, if he is not excluded by his own boundaries, can acquire by prescription lands which lie within the boundaries of another proprietor as part and pertinent of his own lands, because he cannot be limited by the boundaries of another (*Stair*, 2. 3. 73; *Ersk.* 2. 6. 3; *Earl of Fife's Trs.*, 1830, 8 S. 326).

Boundaries having been dealt with, it has next to be shown what estate passes to the disponee under a feu-charter or a disposition of lands. The disponee gets not only the *solum*, but also all "that forms a proper part of the land, from the sky to the centre" (*Bell, Prin.* 737). "So long," it has been said, "as the element of prescription is left out of account, and there is no dispute as to the identity of the subject, nor any express limitation in the grant, the title of the land is held as including everything *a cælo ad centrum*, within the boundaries as drawn on the surface, and the direction of the plumb line let fall therefrom, and produced indefinitely upwards and downwards" (*Rankine on Landownership*, 163). It is customary to insert, after the description of the lands, the words "with the parts and pertinents of the said subjects," but these words are unnecessary, as they carry nothing beyond what would be carried though they were omitted. This rule about parts and pertinents has been stated in these words by Lord Justice-Clerk Hope in *Gordon* (1850, 13 D. at p. 7): "A grant of the lands of A. is as extensive as a grant of the lands of A. with parts and pertinents; for the question, as Erskine says, is, what lands fall under that designation of A. as known in the country, and by what limits these lands are circumscribed?" Thus, if lands are disposed, the disponee gets the buildings, for *inædificatum solo cedit solo* (*Rose*, 1777, Mor. 9645; *Downie*, 1777, M. App. "Implied Assig." 1, 16; *Ersk.* 2. 6. 4-5; *Bell, Prin.* 743), and the fixtures connected with the lands or the buildings, which are deemed *partes soli*, by being annexed, actually or constructively, to the soil.

The *regalia* (*Ersk.* 2. 6. 13; *Bell, Prin.* 669 *et seq.* 737, 740, 748, 750; *Bell, Lect.* i. 606), however, do not pass as part and pertinent of lands under a Crown grant. The *regalia majora*, which include the sovereign's right of

superiority, cannot be communicated to a subject. The *regalia minora* include, *inter alia*, the narrow seas, navigable rivers, highways, foreshores, salmon-fishings, mussels and oysters, ports and harbours, ferries, treasure-trove, and wrecks, and they, with the exception of navigable rivers and highways, can be acquired by express grant from the Crown or by prescription on a habile title (Bell, *Lect.* i. 606). As Professor George Joseph Bell says when speaking of the *regalia minora*: "*Regalia* are excepted from the ordinary rule of pertinents, and even when granted by the Crown to a vassal they are not held to be transferred from that vassal by a conveyance of the land unless expressly mentioned" (Bell, *Prin.* 748); at least, it may be said, unless the vassal clearly shows an intention to convey them (see *Lord Advocate*, 1874, 2 R. 27; *Earl of Breadalbane* 1875, 2 R. 826).

After the description of the lands the disposer in a feu-charter usually adds the words, "together with my whole right, title, and interest in the *dominium utile* of said subjects" (*Jurid. Styles*, i. 11), and the disposer in a disposition usually adds the words, "together with my whole right, title, and interest, present and future, therein" (*ib.* i. 90). Although the form of the words appropriate to a disposition were used in a feu-charter, they would only convey right, title, and interest consistent with the grant of a feu (Bell, *Lect.* i. 608). Either form of words is, however, unnecessary in an onerous conveyance with absolute warrandice, express or implied, as such a conveyance embraces subordinate or supervening rights, although not specially mentioned; but in gratuitous conveyances, without express absolute warrandice, the words ought to be used when the disposer desires to convey subordinate or supervening rights to his disponee (*Lore*, 1863, 2 M. 22; Bell, *Lect.* i. 608).

The appropriate place for reservations or conditions in favour of the parties under a feu-charter or a disposition is the end of the dispositive clause. Among such reservations or conditions are to be found in practice a reservation of mines and minerals, a clause of irritancy *ob non solutum canonem*, provision for allocation of feu-duty, stipulations as to the erection of buildings, etc.

An important reservation, often made by a disposer, is that of mines and minerals. The clause reserving the mines and minerals ought to contain (a) a reservation to the disposer of the mines and minerals within or under the subjects disposed; (b) a power to work the minerals and carry them away; and (c) a provision for payment of such damages as may be occasioned by the working of the mines and minerals, to the surface of the land, or to the buildings erected or to be erected thereon (for form of clause, see *Jurid. Styles*, vol. i. 18). The clause of reservation of mines and minerals should be as explicit as possible. A reservation by a superior of "the haill mines and minerals, of whatsoever nature or quality," was held not to include freestone (*Menzies*, 10 June 1818, F. C.; affd. 1821, 1 Sh. App. 225). A reservation in a contract of excambion of "liberty of working coal and other fossils and minerals" was similarly held not to include freestone (*Duke of Hamilton*, 1841, 3 D. 1121). It was also determined that a clause in a feu-contract, reserving liberty to search and dig for stone quarries and for coal in the lands feued, and to win coals and stones therein, did not comprehend a reservation of blackband ironstone (*Forth and Clyde Navigation Co.*, 1848, 11 D. 122). In the case of the *Magistrates of Glasgow* (1887, 14 R. 346; rev. 1888, 15 R. (H. L.) 94; L. R. 13 App. Ca. 657), the House of Lords, reversing the judgment of the Court of Session, held that the provisions of the Water-Works Clauses Act, 1847 s. 18, which

excludes from conveyances of lands purchased under the Act, unless when expressly mentioned, "mines of coal, ironstone, slate, or other minerals under any land purchased," did not apply to a seam of clay forming the subsoil of the lands disposed. "In construing," said Ld. Watson in the case just cited, "a reservation of mines or minerals, whether it occur in a private deed or in an Enclosure Act, regard must be had not only to the words employed to describe the things reserved, but to the relative position of the parties interested, and to the substance of the transaction or arrangement which such deed or Act embodies. 'Mines' and 'minerals' are not definite terms; they are susceptible of limitation or expansion, according to the intention with which they are used." In the same case Ld. Herschell observed of the reservation of minerals in the Act of 1847: "I think the reservation must be taken to extend to all such bodies and mineral substances lying together in beds, seams, or strata as are commonly worked for profit, and have a value independent of the surface of the land." If a disponent conveys lands reserving to himself the right to work the minerals, the conveyance is construed as a conveyance of the lands to the disponent, under reservation to the disponent of the right of property in the minerals (*Duke of Hamilton*, 1884, 11 R. 963; *affd.* 1885, 12 R. (H. L.) 65). If in a conveyance there is a clause of reservation of mines and minerals in favour of the disponent, and there is nothing said about power to work them, it is thought that he has such power, on the principle that the reservation embraces everything without which the subjects reserved could not be used (see Bell, *Lect.* i. 610; Rankine on *Landownership*, 160, and authorities there cited). When the conveyance containing a reservation of mines and minerals is silent about payment of surface damage, etc., indemnity for such damage is nevertheless due (see *Buchanan*, 1871, 9 M. 554; *rev.* 1873, 11 M. (H. L.), 13; *Livingstone*, 1879, 6 R. 922; *affd.* 1880, 7 R. (H. L.) 1). A disponent who reserves minerals may, however, quite competently stipulate that he shall not be liable for any damages done by the working and removing of the reserved minerals (*Buchanan*, *supra*). An obligation to pay "surface damages, if any," caused by working minerals, is not so restricted as to be applicable only to the state of the ground at the date when the ownership of the surface and that of the minerals were separated from each other (*Oswald*, 1853, 16 D. 70). For example, a proprietor of lands in 1802 granted of even date two dispositions—one of the lands, and the other of the minerals. Power was given to the purchaser of the minerals to win and work them on paying "all surface damages, if any shall be thereby done to the ground of the said lands." In 1878 the working of the minerals caused a subsidence which damaged a house built on the ground subsequent to 1802, and about sixty years prior to 1878. Such damage, it was held, was "surface damages" in the sense of the disposition in favour of the purchaser of the minerals, and the contention of the owners of the minerals that the expression "surface damage" was a flexible term, and ought to be read as applicable to the state of the ground as an ordinary agricultural subject when the surface and the minerals were made separate estates, was rejected. The Second Division held that the obligation to pay surface damages comprehended injury to ordinary and legitimate buildings or erections on the lands; but the judges reserved their opinions as to the rights of parties if the ground became covered with streets and buildings (*Neill's Trs.*, 1880, 7 R. 741).

When a proprietor feus or sells lands under reservation of the minerals, or disposes of the minerals reserving the lands, the minerals are severed from the *dominium utile*, and can be disposed as a separate tenement by those in right of them (*Ker*, 1790, Mor. 2692; *affd.* 1792, 3 Pat. 238;



*Dunlop's Trs.*, 20 June 1809, F. C.; *Livingstone*, 1776, 5 Bro. Supp. 559; *Forbes*, 31 Jan. 1822, and 29 Nov. 1827, F. C.; *Fleeming*, 1868, 6 M. 782; see also *Graham*, 1869, 7 M. 976; rev. 1871, 9 M. (H. L.) 98; *Blair*, 1875, 3 R. 25; affd. 1876, 3 R. (H. L.) 1; *Dunlop*, 1884, 11 R. 963; affd. 1885, 12 R. (H. L.) 65). When minerals are reserved by a superior, he holds them under the same title by which he holds his fee of superiority, and he can dispose them separately, or along with the superiority. Professor Montgomerie Bell lays down the rule that if a superior with such a right to the minerals "does not expressly retain them, they will be comprehended under a disposition of the superiority conceived in the usual and appropriate terms" (Bell, *Lect.* i. 611). But the rule is too broadly laid down; for it must now be considered fixed that, whilst a disposition of the lands will include not only the surface but all the strata below it, the context may show that the disposition of the superiority of the lands was not intended to include the minerals. Thus in *Orr* (1892, 19 R. 700; affd. 1893, 20 R. (H. L.) 27; and cf. *Fleeming, supra*) the Duke of Argyll feued the lands of Hillfoot, part of the estate of Castle Campbell, under reservation of the coals and coal-heughs. Thereafter one Tait acquired the estate of Castle Campbell, so far as remaining in the Duke. Tait having become bankrupt, his trustee in 1837, on the narrative that he had exposed to sale "the superiority and feu-duty of the lands" of Hillfoot, and that Moir, who had previously acquired the *dominium utile* of Hillfoot, had offered a certain sum for these subjects, disposed to him "All and Whole the town and lands of Hillfoot, . . . all as at present possessed" by Moir and his tenants. The feu-rights and infeftments granted by the predecessors of Tait's trustee were excepted from the warrandice clause. When Moir obtained his disposition no coal had been worked in Hillfoot. In 1890, one Orr, who in 1860 acquired from Tait's trustee, *inter alia*, the lands of Castle Campbell, with a description which included the lands of Hillfoot, and the "coals and coal-heughs," raised an action against Moir's representatives to have it declared that the pursuer was proprietor of the coals in Hillfoot in virtue of his conveyance of 1860. Reversing the judgment of the Court of Session, the House of Lords, while recognising that a disposition of lands includes not only the surface but all the strata below it, and that the dispositive clause in the deed of 1837 might be read either as a conveyance of the whole lands of Hillfoot, or as a conveyance of the superiority thereof merely, held that the superiority of the estate, but not the minerals, was conveyed by the disposition of 1837, because the narrative of the deed showed that the superiority was alone conveyed, and that, therefore, Orr was entitled to decree of declarator.

The Act 20 Geo. II. c. 50 abolished all clauses *de non alienando sine consensu superiorum*. This Act did not strike at the legality of conditions against subinfeudation, which are still valid if made before the commencement of the Conveyancing Act, 1874 (see *Campbell*, 1823, 2 S. 341; 1825, 1 W. & S. 690; 1828, 6 S. 679), and invalid if made after that date (37 & 38 Vict. c. 94, s. 22).

Neither of these two Acts, it is thought, has rendered illegal a clause of pre-emption in favour of the disponent of lands (*Preston*, 1805, Mor. App., "Personal and Real," No. 2; 3 Ross' L. C. 289; *Earl of Mar*, 1838, 1 D. 116; Bell, *Lect.* i. 612; Menzies, 600; Bell, *Prin.* 861, 865; *Jurid. Styles*, vol. i. 18). The clause of pre-emption (for form see *Jurid. Styles*, vol. i. 19) is an obligation imposed on a donee, if he intends to sell the lands, to make the first offer to the disponent or his heirs and successors at the price at

which he is prepared to sell to another. A clause of pre-emption, being unfavourable to liberty, will not cover alienations not falling strictly within its terms (*Earl of Mar, supra*: and *Lumsden*, 1843, 5 D. 501), and to be effectual against singular successors it must appear on record (*Gall*, 1729, Mor. 10306).

The irritancy *ob non solutum canonem*, or tinsel of the feu, is often classed among the casualties of superiority, but it is rather a remedy against non-payment of the feu-duties (Bell, *Prin.* 701), or "a contingent irritancy for enforcing payment of feu-duties" (Bell, *Lect.* i. 625). This irritancy was introduced by the Statute 1597, c. 250, which provides that if any vassal or feuar "failzie in making of payment of his few-dewty . . . be the space of twa zeires haill and togidder, they sall amitte and tine their said few of their saids lands, conforme to the civil and canon law, sicklike and in the same manner as gif ane clause irritant were specially ingrossed and insert in thar said infettmentis of few-ferme." Notwithstanding this enactment, it is not uncommon to find in feu-charters a conventional irritancy *ob non solutum canonem* (for form see *Jurid. Styles*, vol. i. 21). In the recent case of *Maxwell's Trs.* (1893, 20 R. 958) opinions were indicated to the effect that a vassal who had incurred an irritancy *ob non solutum canonem* was entitled to purge it by payment of the arrears of feu-duty, without arrears of interest even at a stipulated rate. To enforce the irritancy, whether based on the Statute 1597, c. 250 (for form of summons see *Jurid. Styles*, vol. iii. 62), or on a conventional clause (for form of summons see *ib.* vol. iii. 63), it is necessary to raise an action of declarator (*Lockhart*, 1770, 2 Ross' L. C. 244, Mor. 7244; Bell, *Prin.* 701, and authorities there cited: and see Mackay, *Court of Session Practice*, vol. ii. 96). Prior to the date of the passing of the Conveyancing Acts (1874 and 1879) Amendment Act, 1887 (50 & 51 Vict. c. 69), the irritancy, even when conventional, could be purged by paying the arrears of feu-duty and expenses at any time before the decree of declarator *ob non solutum canonem* was extracted, but not later (*Raith*, 1848, 11 D. 126; *Bellenden*, 1702, Mor. 7252). By sec. 4 of the Act of 1887, however, it is enacted that—

"No decree of declarator of irritancy at the instance of a superior against his vassal *ob non solutum canonem* obtained after the passing of this Act shall be deemed to be final until an extract thereof shall have been recorded in the appropriate Register of Sasines."

If a feu-right is irritated *ob non solutum canonem*, whether in virtue of an irritant clause or under the Act 1597, c. 250, the superior cannot claim arrears of feu-duty (*Magistrates of Edinburgh*, 1834, 12 S. 593; *M'Vicar*, 1748, Mor. 15095), but he takes the land free from all burdens imposed on it, and unaffected by any subfeu-right granted by the vassal (*Cassels*, 1885, 12 R. 722; *Sandeman*, 1883, 10 R. 614: rev. 1885, 12 R. (H. L.) 67) without his consent. In the case of *Cassels (supra)*, a majority of the whole Court held that a decree of declarator of irritancy *ob non solutum canonem*, whether conventional or under the Statute 1597, c. 250, annuls the vassal's rights and all that has followed thereon, including the rights of sub-vassals, without inferring any obligation on the superior to recompense sub-vassals for buildings erected by them on their subfeus; and in the case of *Sandeman (supra)* the House of Lords, reversing the decision of the Second Division, pronounced judgment to the same effect as that in *Cassels*. Sometimes a feu-right contains an express renunciation of the provision of irritancy contained in the Statute 1597, c. 250 (Bell, *Lect.* i. 625).

The feu-duty is a *debitum fundi* on the lands feued, and although a vassal may, unless effectually prohibited by a condition against subinfeudation made before the commencement of the Conveyancing Act, 1874 (s. 22), subfeu the whole or part of his lands, every part of the lands remains, notwithstanding any subfeu, burdened with the whole of the feu-duty. As the effect of this is practically to prevent subinfeudation, the vassal may arrange with the superior to insert in the feu-right to be granted in his favour a clause by which the superior assents to a proportion of the *cumulo* feu-duty being allocated on each part of the lands in the event of the vassal's subfeuing or otherwise disposing his lands in separate parcels (for form of clause, see *Jurid. Styles*, vol. i. 22).

In a feu-charter, feu-contract, or disposition there are very often conditions, positive or negative, about the erection of buildings on the lands disposed. These conditions may have as their object the giving of security for payment of the feu-duty, or the preservation of the amenity of the subjects. For example, there may be an obligation on the disponee to erect within a certain time buildings capable of yielding a rent equal to a certain sum, or to build houses of a certain value and to maintain them when built, or to build according to a plan, or not to build tenements for carrying on any operation which is a nuisance (Rankine on *Landownership*, 352, and cases there cited). Clauses restricting the use of property on the part of a proprietor are strictly construed, the bias of the law being in favour of freedom of ownership (*Heriot's Hospital*, 1773, Mor. 12817; affd. 1774, 3 Pat. 674; *Dennistoun*, 1872, 11 M. 121; *Russell*, 1882, 9 R. 660; *Ross*, 1854, 16 D. 732; *Craig*, 1861, 24 D. 20; *McEwan*, 1880, 7 R. 682; *Moir's Trustees*, 1880, 7 R. 1141; *Buchanan*, 1883, 10 R. 936; *Hood*, 1884, 12 R. 362; *Cowan*, 1887, 14 R. 682; *Miller*, 1888, 15 R. 991; *Johnston*, 1893, 20 R. 539; *Middleton*, 1894, 21 R. 781; and other authorities cited in Rankine on *Landownership*, 420 *et seq.*); but unambiguous words in such clauses will receive their full effect (*Greenhill*, 1824, 3 S. 325; and Rankine on *Landownership*, 423 *et seq.*). That building restrictions, as well as other restrictions, can be imposed on a disponee by means of plans is undoubted; but the mere exhibition of plans to intending feuars does not of itself impose any obligation on them to act in conformity with the plans (*Heriot's Hospital*, 1814, 2 Dow, 301; and see *Croall*, 1870, 9 M. 323); nor will a reference to a plan, *eg.* a general feuing plan, in the titles of property, if the reference is only for the purpose of identifying the subjects, be construed as binding the proprietors to build in accordance with it (*Gordon*, 1818, 6 Dow, 87; *Walker*, 1825, 3 S. 650; *Barr*, 16 D. 1049; *Free St. Mark's Church*, 1869, 7 M. 415). To have this effect the plan must be shown by the titles to be part of the contract between the parties (*Dirom*, 5 June 1812, in note to *Young & Co.*, 17 Nov. 1814, F. C.; *Sim*, 1827, 5 S. 841; *Cockburn*, 1825, 4 S. 128; alt. 1826, 2 W. & S. 293; *Fowler*, 1831, 9 S. 705; *Henderson*, 1840, 2 D. 869; *Skinner*, 1855, 18 D. 158; *Magistrates of Edinburgh*, 1858, 20 D. 156; and see *Crawford*, 1874, 2 R. 20; *Fleming*, 1879, 7 R. 179; affd. 1883, 10 R. (H. L.) 30), for the rule is that the execution of a formal conveyance, even although it bears expressly to be in implement of a previous contract, supersedes that contract altogether, so that the conveyance is the measure of the rights and the liabilities of the contracting parties (*Lee*, 1882, 10 R. 230; affd. 1883, 10 R. (H. L.) 91; *Croall*, *supra*; *Barr*, 1854, *supra*; *Sim*, 1827, *supra*).

An important question has often arisen in connection with building restrictions, as to whether a person who was not a party to the deed con-



stituting them has an implied right or a *jus quæsitum* to enforce implement of them. On this matter the leading case is *MacRitchie's Trustees* (1879, 7 R. 384; rev. 1881, 8 R. (H. L.) 95). In that case a vassal (who was one of several vassals holding of the same superiors) bound himself and his heirs and successors in a feu-contract "not to erect any other buildings upon the said piece of ground except the tenement of houses and walls of enclosure already erected thereon, and if he or they shall build any offices upon the back ground, which they are at liberty to do, the same shall not exceed twelve feet in height in the side walls." A singular successor in the feu (Hislop) proceeded to build over a portion of a plot of ground in front of his office. The feuars of another plot (*MacRitchie's Trustees*), who by the feu-right under which they held were prohibited from erecting on their feu any other buildings except necessary offices, raised a suspension and interdict against Hislop's operations with consent of the common superiors. The Second Division held that the fact of the superior appearing on the face of the note as a consenter and concurrer gave the complainer a good title to sue the interdict, and accordingly granted the interdict craved. The case, however, went to the House of Lords, where the judgment of the Second Division was reversed. The House of Lords held: (1) that the fact that there are several feuars of adjoining plots of building-ground in the same street holding from a common superior does not, by itself, entitle any one of the feuars to insist on the observance of restrictions in the feu-rights of another; (2) that to entitle one of such feuars so to insist there must be some mutuality and community of rights and obligations otherwise established between them; (3) that such mutuality and community of rights and obligations can be established (*a*) by express stipulation in their respective contracts with the superior, or (*b*) by reasonable implication from some reference in the contracts to a common plan or scheme of building, or (*c*) by mutual agreement between the feuars themselves; and (4) that where the principal party to an action had no right or title whatever, the consent and concurrence of the party to whom alone such right or title belonged did not cure the defect of title in the principal party to the action. At delivering judgment, Ld. Watson, after a reference to those cases in which it had been held that each of a class of feuars had an implied right to enforce a common condition, said: "All of those appear to me to fall under one or other of two categories,—either (1) where the superior feus out his land in separate lots for the erection of houses, in streets or squares, upon a uniform plan; or (2) where the superior feus out a considerable area with a view to its being subdivided and built upon, without prescribing any definite plan, but imposing certain general restrictions, which the feuar is taken bound to insert in all subfeus or dispositions to be granted by him." To the first of these categories he assigned *McGibbon* (1871, 9 M. 423), to the second *Robertson* (1874, 1 R. 1213). "The *ratio decidendi*," continued his Lordship, "in such cases as *McGibbon*, seems to have been that a feuar who stipulates with his superior that a particular restriction shall be imposed upon all his fellow-feuars as well as upon himself, must intend that he shall have the power of enforcing it against them, and that they shall have the like power as in a question with him. In *Robertson*, and similar cases, the principle of decision appears to me to have been that a subfeuar or disponent acquiring a building lot, subject to a particular condition, with notice in his titles that the common author, whether his immediate or over-superior, has imposed that condition upon the whole area of which his lot formed a part, must be taken as consenting that the condition shall be for

mutual behoof of all the feuars or disponees within the area, and that all who have interest shall have a title to enforce it. In other words, the feuar is held as consenting to be bound by the law laid down by the common author for the benefit of all future feuars. I have been unable to find any decision proceeding upon the principle that a superior who feus out a portion of his estate to A. under a precise restriction as to building, and who, in giving a title to A., neither undertakes, nor intimates an intention, to impose similar restrictions in feuing the remainder of his ground, can thereafter confer upon every feuar who acquires a building lot in the vicinity a *jus quasitum* enabling him to sue A. directly" (see also cases *Beattie*, 1876, 3 R. 634; *Ewing*, 1878, 5 R. 439; *Dalrymple*, 1878, 5 R. 847; *Cochran*, 1882, 9 R. 634; and compare *Walker*, 1888, 15 R. 477; *Miller*, 1888, 15 R. 991; *North British Railway Co.*, 1891, 18 R. 1021; *Johnston*, 1893, 20 R. 539).

By sect. 22 of the Conveyancing Act, 1874, conditions securing monopolies to a superior's agent, as well as clauses prohibiting subinfeudation, are declared illegal. The section is in these terms:—

"All conditions, whether made before or after the commencement of this Act, to the effect that the superior shall be entitled to select or appoint an agent to prepare or record sasines or warrants of registration, or conveyances or other deeds having reference to any estate in land, or restraining or restricting the proprietor of any estate in land in the selection of an agent to prepare or record such sasines, warrants, conveyances, or other deeds, or securing any privilege or monopoly to the superior's agent, or to any agent or agents selected or appointed by him, or to the effect that any proprietor of lands shall be bound to intimate to the superior of such lands any change of ownership, whether by succession or singular title, except as hereinbefore provided, or to pay any fees or expenses in connection with such change of ownership, and further, all conditions made after the commencement of this Act, to the effect that it shall not be lawful to the proprietor of lands to subfeud the same to be holden of himself as immediate lawful superior thereof, or to grant conveyances thereof to be holden *a me vel de me* or with an alternative manner of holding, shall, with all irritant clauses applicable thereto, be null and void, and not capable of being enforced, and all enactments to the contrary of, or at variance with, this enactment in any Act of Parliament shall be and the same are hereby repealed." (On sec. 22 see *Magistrates of Edinburgh*, 1876, 3 R. 663.)

In the form of the feu-charter given above, it will be noticed that the conditions, restrictions, or qualifications of the grant are declared real and preferable burdens. Sometimes the clause declaratory of these burdens is fenced by an irritant clause, and sometimes by both an irritant and a resolutive clause (for form, see *Jurid. Styles*, vol. i. 25).

Real burdens are those which affect the lands themselves, and not the grantee and his heirs alone; they, as has been said, run with the lands. Notwithstanding the distinction which may be drawn between a real burden and a real condition, or an inherent condition of a grant of lands, and the different ways of enforcing them, the term "real burden" is in practice applied to both. A real burden, in the strictest sense of the expression, is a reserved money payment out of the lands, contained in an original grant or deed of transmission of land, and it cannot be enforced by a personal action in the absence of an obligation for payment specially undertaken. In the absence

of such obligation for payment, it is only enforceable against the lands by real diligence. But a real condition, as distinguished from a real burden in a grant of lands, constitutes an integral part of such grant, and it can be enforced by personal action against the proprietor of the lands for the time being. An example of a real condition in this sense is a condition in a feu-charter regarding the erection of buildings. Those in right of such a condition have the power to insist on its implement by raising a personal action against those who are bound by it. The distinction between a real burden and a real condition or an inherent condition of a grant of lands, just alluded to, is drawn by Ld. Deas in the case of the *Marquis of Tweeddale's Trustees* (1880, 7 R. at p. 634). Alluding to the burdens regarding the amenity of the Square and the buildings on it, which were held valid as inherent conditions of the grant in the case of *Tailors of Aberdeen* (20 Dec. 1834, 13 S. 226; affd. 3 Aug. 1840, 1 Rob. 296), against singular successors of the disponee in the disposition of the burgh subjects in which the burdens were constituted, his Lordship observed: "It follows from what I have said, on the strength of the authorities in a previous part of this opinion, that a properly constituted real burden for debt gives an absolutely indefeasible preference to the creditor named, which is not conferred by an inherent condition of the right. On the other hand, an inherent condition of the right has the advantage of being enforceable by personal action against the proprietor or proprietors for the time being at the instance of whosoever has an interest to enforce it, whether named in the deed or not. For instance, there could be no doubt that when the houses in Bon-Accord Square came to be the property of different individuals, any one proprietor interested might enforce against any other proprietor or proprietors the conditions forming inherent conditions of the right, either by insisting on specific implement, or the application of money as the universal solvent" (7 R. 634).

The essentials of a real burden for the payment of a sum of money, valid against singular successors are these: (1) The amount must be definite (*Tailors of Aberdeen, supra*; *Magistrates of Edinburgh*, 1883, 11 R. 352), unless the burden is a condition constituting an integral part of an original grant, when it is not essential that the amount be specified (*Clark*, 1850, 12 D. 1047; rev. 1854, 17 D. (H. L.) 27, 1 Macq. 668; and see *Marshall*, 1895, 22 R. 954). (2) The name of the creditor must be specified (Ersk. 2. 3. 50). (3) The burden must be declared in words which clearly express or plainly imply that the lands themselves are to be affected by it, and not the grantee and his heirs alone (Ld. Corehouse in *Tailors of Aberdeen, supra*; *Mackenzie*, 1719; affd. 1721, 3 Ross' L. C. 1, Rob. App. 607; *Martin*, 1808, M. App. "Personal and Real," No. 5, 3 Ross' L. C. 17; *M'Intyre*, 1824, 2 S. 664; *Forbes' Trs.*, 1833, 12 S. 219; *Magistrates of Arbroath*, 1872, 10 M. 630; and see *Magistrates of Edinburgh, supra*). In the case of *Williamson* (1887, 14 R. 720), Ld. Pres. Inglis expressed an opinion that neither a general disposition without a description of the lands conveyed, nor a notarial instrument following thereon in terms of Sched. (I) of the Titles to Land Consolidation Act, 1868, can create a real burden on the lands. This opinion was followed by the Second Division in *Cowie's Trs.*, but was overruled by the House of Lords on appeal (1891, 18 R. 706; rev. 1893, 2 R. (H. L.) 81). (4) The clause constituting the burden must appear in the investiture and in the appropriate Register of Sasines (Ld. Corehouse in *Tailors of Aberdeen, supra*; and see Ld. Deas in *Stewart*, 1860, 22 D. 755; affd. 1861, 4 Macq. 499).

The essentials of a real burden not for the payment of money are as follows: (1) It must be shown that a real burden or condition was intended



to be constituted by the deed (see *Ld. Corehouse in Tailors of Aberdeen, supra*, 1 Rob. App. at pp. 312 and 313; *Stirling*, 1756, Mor. 2342; and see *Morier*, 1895, 23 R. 67). (2) Words must be used which clearly express or plainly imply that the lands themselves are to be affected, and not the grantee and his heirs alone (*Tailors of Aberdeen, supra*). (3) The words constituting the real burden or condition must appear in the appropriate Register of Sasines (*Ld. Corehouse in Tailors of Aberdeen, supra*). (4) The burden or condition must not be (a) contrary to law; or (b) inconsistent with the nature of the species of the property disposed; or (c) useless or vexatious; or (d) contrary to public policy (*ib.*). (5) The superior, or the party in whose favour it is conceived, must have an interest to enforce it.

If the essentials above mentioned concur, it is not necessary in the constitution of a real burden or condition that any *verbes signat* or technical form of words should be employed; nor is it necessary to have a declaration that the obligation is real, or that it is a *debitum fundi*, or that it shall be inserted in future infestments, or that it shall attach to singular successors, or to fence the obligation with an irritant clause, or with irritant and resolute clauses. If a burden is personal, an irritant clause will not make it real; but the presence of such a clause may be one reason for presuming, in the construction of a condition which is ambiguous in its terms, that the granter of the deed in which the condition occurs meant it to apply not only to the grantee and his heirs, but also to singular successors. Besides, a superior in feudal subjects or the disposer of burgage lands, in right of a real burden or condition fenced with an irritant clause, has a powerful remedy in case of contravention, for he can raise an action of declarator to have it found that, in respect of the contravention and the irritant clause, the right of the proprietor in possession is at an end (see *Ld. Corehouse in Tailors of Aberdeen*, 1 Rob. App. at p. 315). Burdens which are *inter naturalia* of a feu, i.e. inherent conditions of a feudal grant, do not require to be declared real, or to appear on record. Such burdens run with the lands, and are perpetual qualifications affecting both the original superior and vassal, and their respective heirs and singular successors (*Ersk. 2. 3. 11*; and see *Stewart*, 1860, 22 D. 755; *afid.* 4 Macq. 499; *Hop*, 1864, 2 M. 670).

It is necessary to add that the rules which have been stated with regard to real burdens or real conditions valid in law against singular successors apply only when infestment has been taken. So long as no infestment has been taken on the deed imposing burdens—in other words, so long as the right remains personal—an heir or assignee must take the personal title subject to the burdens which were binding on the original disponent, in respect that he cannot both plead the personal title and repudiate its conditions (*Preston*, 1805, Mor. App. "Personal and Real," No. 2, 3 Ross' L. C. 289; *Bell, Lect. i. 612*; *Menzies*, 603).

At one time a reference to burdens was insufficient against creditors or singular successors (*Duke of Argyll*, 1730, Mor. 10306, *Menzies*, 604), but now, instead of setting forth particularly the real burdens or real conditions effeiring to lands in a conveyance thereof, it is competent to import them into the conveyance by reference in statutory form. Before giving the existing provisions as to insertion of real burdens or conditions by reference, it may be well to notice the prior enactments regarding the subject:—

- (1) From and after 30 September 1847 (10 & 11 Vict. c. 48, s. 23), it was made competent by the Lands Transference Act, 1847, in all cases where lands or heritages not held by burgage tenure were

then or should thereafter be held under any real burdens or conditions or limitations whatsoever, appointed to be fully inserted in the investitures of such lands, to omit the full insertion of real burdens, etc., in dispositions and conveyances, etc., of such lands, etc., provided that they were specially referred to as set forth at full length in the recorded instrument of sasine wherein they were first inserted, or in any recorded instrument of sasine of subsequent date forming part of the progress of titles of the lands, such reference being made in the terms set forth in Sched. (C) of the Act (10 & 11 Vict. c. 48, s. 5).

- (2) From and after 30 September 1847 (10 & 11 Vict. c. 49, s. 13) it was made competent by the Lands Transference Burgage Act, 1847, in all cases where lands held burgage were or should thereafter be held under any such real burdens, etc., appointed to be fully inserted in the investitures of such lands, to omit the full insertion of real burdens, etc., in dispositions and conveyances of such lands, etc., provided they were specially referred to as set forth at full length in the recorded instrument of resignation and sasine in which the same were first inserted, or in any recorded instrument of resignation and sasine, or of cognition and sasine, of subsequent date, and forming part of the progress of titles of the lands, such reference being made in the terms set forth in Sched. (C) of the Act (*ib.* s. 4).
- (3) From and after 30 September 1847 (10 & 11 Vict. c. 50, s. 1) it was made competent by the Heritable Securities Act, 1847, in the case of bonds and dispositions in security granted in terms of the Act, notwithstanding any declaration to the contrary contained, or to be contained, in the rights and title deeds of the lands embraced by the security, instead of inserting at full length any conditions, reservations, restrictions, and provisions under which the lands and other heritages were held, to make reference to the same as set forth at full length in the recorded instrument, whether of sasine or resignation *ad remanentiam*, in which the same were first inserted, or any other recorded instrument of sasine forming a part of the investiture of the granter of such security in the lands, and which contained such conditions, reservations, restrictions, and provisions at full length, such recorded instrument being described by the name of the person in whose favour the same was expedite, the Register of Sasines in which the same was recorded, and the date of recording the same (10 & 11 Vict. c. 50, s. 4).
- (4) From and after 1 October 1847 (10 & 11 Vict. c. 51, s. 1) it was made competent by the Crown Charters Act, 1847, in all cases where lands then were or should thereafter be held under any real burdens, or conditions, or limitations whatsoever, appointed to be fully inserted in the investitures of such lands, to omit in Crown charters and precepts containing such lands, and the instruments of sasine following on such charters and precepts respectively, the full insertion of such real burdens, etc., provided that they were specially referred to as set forth at full length in the recorded instrument, whether of sasine or of resignation *ad remanentiam*, wherein the same were first inserted, or in any recorded instrument of sasine of subsequent date forming part of the progress of titles of such lands, such reference being made in the terms contained in Sched. (C) of the Act (10 & 11 Vict. c. 51, s. 27).

- (5) From and after 15 November 1847 (10 & 11 Vict. c. 47, s. 6) it was competent by the Service of Heirs Act, 1847, in all cases of special service where the lands were held under any real burdens, or conditions, or limitations whatsoever appointed to be fully inserted in the investiture of such lands, to omit in the petition of service, and in the decree of service to follow thereon, and in the precepts, sasines, or other instruments necessary to complete the investiture following on such decree, the full insertion of such real burdens, etc., provided they should be therein specially and directly referred to as set forth at full length in the recorded instrument of sasine in favour of the deceased person served to, or as set forth at full length in the recorded instrument of sasine or of resignation *ad remanentiam* of the said lands in which they were first inserted, or in any other intermediate recorded instrument of sasine, such reference being made in the form of Sched. (B) of the Act (*ib.* s. 5).
- (6) By the five preceding enactments reference was required to be made to the real burdens as set forth at full length in a duly recorded instrument of sasine forming part of the progress of titles: but from and after 1 October 1860 it was made lawful by the Titles to Land Burgage Act, 1860, to make reference to the real burdens, etc., as set forth at full length in any conveyance or notarial instrument recorded in the appropriate Register of Sasines relating to the lands to which such real burdens, etc., applied (23 & 24 Vict. c. 143, s. 31).

The enactments of the six Statutes just cited were repealed, and with some alterations re-enacted, by sec. 10 of the Titles to Land Consolidation Act, 1868. That section is as follows:—

“Where lands are, or shall hereafter be, held under any real burdens or conditions or provisions or limitations whatsoever appointed to be fully inserted in the investitures of such lands, it shall, notwithstanding such appointment, and notwithstanding any law or practice to the contrary, not be necessary in any conveyance or deed of or relating to such lands to insert such real burdens or conditions or provisions or limitations, provided the same shall, in such conveyance or deed, be specially referred to as set forth at full length in the conveyance or deed of or relating to such lands, recorded in the appropriate Register of Sasines, wherein the same were first inserted, or in any such conveyance or deed of subsequent date recorded as aforesaid, and forming part of the progress of titles of the said lands, such reference being made in the terms, or as nearly as may be in the terms, set forth in Sched. (D) hereto annexed; and the reference to such real burdens or conditions or provisions or limitations, if so made in any such conveyance or deed, whether dated prior or subsequent to the commencement of this Act, shall be held to be equivalent to the full insertion thereof, and shall, to all intents and in all questions whatever, whether with the disponent or superior or third parties, have the same legal effect as if the same had been inserted exactly as they are expressed in the recorded conveyance or deed referred to, notwithstanding any law or practice or Act or Acts of Parliament to the contrary.”

Sched. (D) is in these words:—

[After the description of the lands, instead of inserting the burdens, etc., at length, these may be referred to as follows, viz.:] but always with and under the real burdens, conditions, provisions, and limitations [or such of these as may apply or have reference to the case] specified



in a deed [or instrument, here specify a deed or conveyance in which the burdens, etc., were first inserted, or any subsequent deed or conveyance in which they are inserted, forming part of the progress of the titles to the lands] recorded [specify Register of Sasines, or, if the deed or conveyance as recorded has been previously referred to, say in the said deed [or instrument] recorded as aforesaid] on the                      day of                      in the year

[And in subsequent clauses in which it is requisite or usual to refer again to the burdens etc., the reference may be made thus:] but always with and under the real burdens, conditions, provisions, and limitations [or such of these as may apply or have reference to the case] before referred to.

It will be noticed that, while it was made competent by the Titles to Land Consolidation Act, 1868, to refer in statutory form to real burdens, conditions, etc., in a deed dealing with the lands held under such burdens, conditions, etc., instead of inserting them *ad longum*, the Conveyancing Act, 1874 (37 & 38 Vict. c. 94, s. 32), first authorised reservations, real burdens, etc., to be imported by reference into feu-charters or other original grants. In other words, prior to Act of 1874 it was considered necessary to insert in an original conveyance of land, such as a feu-charter or a feu-contract, the real burdens of the grant *ad longum*, although it was competent in subsequent deeds of transmission of the land to refer to them in virtue of the provisions of the prior Statutes which have been referred to above. Sec. 32 of the Conveyancing Act, 1874, however, enacts (1) that real burdens, etc., affecting lands may be imported into *any* deed (including original grants of land) relating to such lands by reference to a duly recorded deed applicable to such lands, or to the estate of which such lands form a part, in which the real burdens, etc., are set forth at length; and (2) that a proprietor may record in the Register of Sasines appropriate to his lands a deed setting forth real burdens, etc., under which he is to feu, or otherwise deal with or affect his lands, or any part thereof, and that the same may be imported, in whole or in part, by reference into any deeds, including original grants as well as deeds of transmission relating to the lands. Sec. 32 of this Act provides:—

“Reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations affecting land may be validly and effectually imported into any deed, instrument, or writing relating to such lands by reference to a deed, instrument, or writing applicable to such lands, or to the estate of which such lands form a part, recorded in the appropriate Register of Sasines, and in which such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations are set forth at full length, and a reference in the form set forth in Sched. H hereto annexed, or in a similar form, shall be sufficient. And it shall be lawful for any proprietor of lands to execute a deed, instrument, or writing setting forth the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations under which he is to feu or otherwise deal with or affect his lands, or any part thereof, and to record the same in the appropriate Register of Sasines; and the same being so recorded, such reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations may be effectually imported in whole or in part by reference into any deed or conveyance relating to such lands subsequently granted by such proprietor, or by his heir or successor, or by any person whatsoever, provided it is expressly stated in such deed or conveyance that it is granted under the reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations set forth in such deed, instrument, or writing.”

Sched. H runs thus:—

The reservations, real burdens, conditions, provisions, limitations, obligations, and stipulations [or as the case may be] specified in [refer to the deed, instrument, or writing in such terms as shall be sufficient to identify it, and specify the register in which it is recorded, and the date of registration, or where the deed, instrument, or writing referred to is recorded on the same date as the deed, instrument, or writing containing the reference, here say, recorded on even date with the recording of these presents].

From what has been set forth regarding real burdens in original grants of lands, such as feu-charters or feu-contracts, and from the provisions of sec. 32 and terms of Sched. H of the Conveyancing Act, 1874, it follows that real burdens or conditions can now be either (1) particularly set forth, or (2) referred to as contained in a deed, instrument, or writing setting forth particularly the real burdens or conditions under which the land is to be feued or otherwise dealt with, such deed, instrument, or writing being referred to in such terms as are sufficient to identify it, the register in which it is recorded and the date of registration being specified, or (3) referred to as contained in any deed applicable to the lands or to the estate of which the lands form part in which they are set forth at length. References to real burdens in deeds of transmission may, it seems, be in the form either of Sched. (D) of the Titles to Land Consolidation Act, 1868, or of Sched. H of the Conveyancing Act, 1874; but of the two schedules perhaps the first is the more appropriate to such references in deeds of transmission (see *Jurid. Styles*, i. 91). The first part of sec. 32 of the Conveyancing Act, 1874, while similar in enactment to sec. 10 of the Titles to Land Consolidation Act, 1868, is wider in its scope, and has removed a doubt sometimes felt as to whether a reference to real burdens could be made under the latter Act in a deed of transmission when the lands contained in it were only a portion of the lands in the deed referred to.

To ensure the insertion in the Register of Sasines of real burdens contained in an original grant of lands various methods can be adopted. (1) The disponent may direct the burdens to be inserted in any notarial instrument to follow on the charter, and to be inserted or validly referred to in all future deeds of transmission, decrees, instruments, or other writs of or relating to the subjects disposed, or any part thereof, and then follow this direction with a clause of irritancy declaring that otherwise all such deeds, decrees, and instruments shall be void and null (see *Jurid. Styles*, i. 26, 44). Relative to the insertion of real burdens in deeds of transmission are the enactments of sec. 146 of the Titles to Land Consolidation Act, 1868, which re-enacts the provisions of 21 & 22 Vict. c. 76, s. 29, and 23 & 24 Vict. c. 143, ss. 17 and 31, and is as follows:—

“Where any real burden, condition, provision, or limitation, or other matter has been or shall be appointed to be inserted or referred to in the instruments of sasine, or of resignation *ad remanentiam*, or other instruments applicable to any lands, such real burden, condition, provision, or limitation, or other matter, shall be inserted or referred to in manner provided by this Act in every instrument applicable to such lands to be expedite in virtue of this Act, and in every conveyance or deed of or relating to such lands the registration of which in the Register of Sasines is by this Act equivalent to infeftment or resignation *ad remanentiam*: Provided always, that where such real burdens, conditions, provisions, limitations, or other matters have been already inserted in any conveyance or deed or instrument recorded in the appropriate Register of Sasines, it shall not be necessary to insert the same at length in any subsequent con-

veyance or deed or instrument, provided the same be therein referred to in manner provided in the ninth or tenth sections of this Act, as the circumstances of the case may require."

(2) The direction to have the real burdens duly inserted on record may be followed not only by an irritant clause, but also by a resolute clause (for form where irritant clause and resolute clause are used, see *Jurid. Styles*, i. 25). (3) Another method is to insert before the testing clause, whether of an original grant of land or a deed of transmission, a clause of direction to the effect that the part of the conveyance constituting the real burdens shall be recorded in the Register of Sasines in accordance with sec. 12 of the Titles to Land Consolidation Act, 1868. Sec. 12 re-enacts, with slight alterations, the provisions of 21 & 22 Vict. c. 76, s. 3, and 23 & 24 Vict. c. 143, ss. 5 and 25, and is as follows:—

"Immediately before the testing clause of any conveyance of lands, it shall be competent to insert a clause of direction in, or as nearly as may be in, the form of No. 1 of Sched. (F) hereto annexed, specifying the part or parts of the conveyance which the granter thereof desires to be recorded in the Register of Sasines; and when such clause is so inserted in any conveyance, whether dated before or after the commencement of this Act, and with a warrant of registration thereon, in which express reference is made to such clause of direction (such warrant being in the form as nearly as may be of No. 2 of Sched. (F) hereto annexed), is presented to the keeper of the appropriate Register of Sasines for registration, such keeper shall record such part or parts only, together with the clause of direction and the testing clause and warrant of registration; and in the absence of such express reference in the warrant of registration as aforesaid, such conveyance shall be engrossed in the register as if it had contained no clause of direction; and the recording of such part or parts of the conveyance, together with the clause of direction and the testing clause, and the warrant of registration as before provided, shall have the same legal effect as if, at the date of such recording, a notarial instrument, containing such part or parts of the conveyance, had been duly expedite and recorded in the appropriate Register of Sasines in favour of the person on whose behalf the conveyance is presented: Provided that, notwithstanding such clause of direction, it shall be competent for the person entitled to present the conveyance for registration to record the whole conveyance, or to expedite and record a notarial instrument thereon, as after provided, in the same manner as if the conveyance had contained no such clause of direction; and where such notarial instrument shall be expedite, no part or parts of the conveyance directed to be recorded shall be omitted from such instrument."

Sched. (F), No. 1, is in these terms:—

And I direct to be recorded in the Register of Sasines the part of this deed from its commencement to the words [*insert words*] on the \_\_\_\_\_ line of the \_\_\_\_\_ page [and also the part from the words [*insert words*] on the \_\_\_\_\_ line of the \_\_\_\_\_ page to the words [*insert words*] on the \_\_\_\_\_ line of the \_\_\_\_\_ page]. [*Or, I direct the whole of this deed to be recorded in the Register of Sasines, with the exception of the part [or parts, as the case may be, specifying the part or parts excepted, as above].*]

Sched. (F), No. 2, is in these terms:—

Register the above deed in terms of the clause of direction therein contained on behalf of A. B. [*insert designation*] in the register of the county of C. [*or if the writ con-*



tains land in more than one county, in the registers of the counties of C., D., E., and F., or if the lands be held burgage, in the register or registers of the burgh of M., or burghs of M., N., O., and P.]

(Signed)

A. B.,

[or] G. H.,

W.S., Edinburgh, agent,

[or] J. K. & L.,

W.S., Edinburgh, agents

[or as the case may be].

(4) Another method sometimes adopted is to stipulate that the whole conveyance shall be recorded in the appropriate Register of Sasines within a short period, and that the unrecorded conveyance shall not be assignable to any person or persons, or available as a warrant for any notarial or other instrument (*Jurid. Styles*, i. 26; Bell, *Lect.* i. 616). (5) There may be a combination of the methods (1), (2), and (4), as shown in the *Juridical Styles* (vol. i. 25),—i.e. a direction to insert the real burdens in the infeftments to follow on the conveyance, and to insert or duly refer to them in all future transmissions and other writs relating to the subjects, this direction being fenced by an irritant as well as a resolutive clause, and a stipulation that the whole conveyance shall be recorded in the appropriate Register of Sasines within a certain period, and that it, prior to such recording, shall not be assignable or available as a warrant for any notarial or other instrument. When the precept of sasine was in use, and infeftment was taken by expeding and recording an instrument of sasine, insertion in that sasine was secured by making the real burdens a part of the precept of sasine (Menzies, 604).

The dispositive clause is the ruling clause of a feu-charter or other conveyance of lands (Ersk. 3. 8. 47). Accordingly, an unambiguous dispositive clause in an *inter vivos* conveyance of lands cannot be modified by reference to either the narrative clause (*Chancellor*, 1872, 10 M. 995; and see *Inglis*, 1894, 22 R. 266; affd. 1895, 22 R. (H. L.) 51; *Duke of Sutherland's Trs.*, 1895, 22 R. 839; rev. 1896, 23 R. (H. L.) 32) or the executive clauses (*Forrester*, 1826, 4 S. 824; *Shanks*, 1797, 1 Ross' L. C. 42) of the deed. But where the terms of the dispositive clause are susceptible of more than one interpretation, other parts of the deed may be referred to in aid of its construction (*Orr*, 1892, 19 R. 700; rev. 1893, 20 R. (H. L.) 27); and where the dispositive clause of a deed has manifestly omitted something which is contained in the other clauses, the omission has been supplied from these clauses (see, e.g., *Sutherland*, 1801, Mor. App. voce "Tailzie," i. No. 8, 1 Ross' L. C. 45; and compare *Earl of Aboyne*, 16 Nov. 1814, F. C.; *Graham*, 20 June 1816, F. C.; and *Ld. Chan. Eldon in Innes*, 1810, 5 Pat. 320, at p. 444, reviewing the judgment in *Hay*, 1788, Mor. 2315; aff. 1789, 3 Pat. 142).

(III.) TERM OF ENTRY.—Before the Lands Transference Act, 1847, the term of entry was contained in the clause of assignation of rents. Since then the statutory form of the clause of entry has been: "With entry at the term of " (31 & 32 Vict. c. 101, s. 5, and Sched. (B), No. 1). The date of entry ought always to be set forth; but if it is not, it will be determined in accordance with the provisions of sec. 28 of the Conveyancing Act, 1874, which enacts:—

"Where no term of entry is stated in a conveyance of lands, the entry shall be at the first term of Whitsunday or Martinmas after the date or last date of the conveyance, unless it shall appear from the terms of the conveyance that another term of entry was intended."

In a contract of sale of heritable subjects the term "immediate entry"

means merely such early possession as is possible and practicable in the circumstances (*Heys*, 1890, 17 R. 381).

(IV.) *TENENDAS*.—The object of this clause is (1) to point out the superior of whom the lands disposed are to be held, and (2) to specify the tenure by which they are to be held (Bell, *Lect.* i. 632; Menzies, 550). The holding under an original grant is, and has always been, a holding *de me*, as Menzies says (Menzies, 551), permanently subordinate to the granter and his successors. Originally, in addition to expressing the kind of holding, the *tenendas* clause contained a list of accessories, privileges, and servitudes which pass *sub silentio* as pertinents of the grant, and also the destination to heirs (Ross, *Lect.* ii. 164; Ersk. 2. 6. 4 *et seq.*; Bell, *Lect.* i. 632; Menzies, 550). The part of the *tenendas* containing the destination to heirs was called the *habendum*. The specification of accessory rights was continued in charters from the Crown until the commencement of the Crown Charters Act, 1847 (10 & 11 Vict. c. 51), but long before that year it had been omitted from charters by subject-superiors (Bell, *Lect.* i. 632; Menzies, 550), in respect that it was superfluous, the extent of the grant being governed by the dispositive clause, and parts and pertinents being carried without enumeration (see *Earl of Aboyne*, 16 Nov. 1814, F. C.; *affd.* 1818, 6 Pat. 380; and *Keith*, 1668, Mor. 2256). Whilst the *tenendas* is not a conveying clause, it may in some cases raise a presumption in favour of the donee, so as to entitle him to establish a right by evidence of possession (see *Ld. Colonsay in Lord Advocate*, 3 M. 981; *affd.* 1867, 5 M. (H. L.) 97; and see *Lord Advocate*, 1874, 2 R. 27; Menzies, 551).

(V.) *REDDENDO*.—This clause specifies the payments or other prestations to be made by the vassal to his superior. In feus granted after the commencement of the Conveyancing Act, 1874, the annual feu-duty must be of fixed amount or quantity; but it is lawful to condition or stipulate for a permanent increase or reduction of the feu-duty, provided (a) that the amount of such increase or reduction is certain, and (b) that the time or times from and after which such increase or reduction is to have effect are also certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which, under the terms of such conditions or stipulations, the increase or reduction is to have effect. In feus granted after the commencement of the Conveyancing Act, 1874, no casualties or duties are by law, irrespective of express condition or covenant, payable to the granter of the feu or his successors in the superiority; but, whilst it is not lawful to condition or stipulate for any casualty to be paid on the succession of an heir or the acquisition of a singular successor, it is lawful to condition or stipulate for payment of a casualty in the form of a periodical fixed sum or quantity, provided (a) that such periodical additional sum or quantity is certain, and (b) that the time or times at which such additional sum or quantity shall be exigible are also certain, and not dependent upon any event or occurrence except the occurrence or recurrence of the time or times at which, under the terms of such conditions or stipulations, the periodical sum or quantity is made exigible (s. 23).

In consequence of the provisions of sec. 23 of the Act of 1874, it is not uncommon in practice for superiors to stipulate in feu-rights for payment of a duplicand of the feu-duty payable at the end of a certain number of years, and such a stipulation is inserted at the end of the *reddendo* (see *Jurid. Styles*, vol. i. 28). But in all cases where superiors had agreed, prior to the passing (7 August 1874) of the Act, to feu land, but had not granted the feu-rights prior to the commencement (1 October 1874)

thereof, it was competent in such feu-rights to stipulate for payment of the casualties which the vassals might expressly or by force of law have agreed to, in the same manner as might have been done prior to the commencement of the Act. It was, however, in the option of either superiors or vassals to have such casualties converted into annual sums equal to four per cent. on the amount of the price of the redemption thereof, ascertained as provided in sec. 15 of the Act, and these annual sums are to be deemed feu-duties, with all the legal qualities thereof (s. 24).

Before the passing of the Conveyancing Act, 1874, parties to feu-rights could stipulate for payment of feu-duties in almost any way agreeable to them. It was not then essential, as it is now, that they should be of fixed amount or quantity. In feu-rights, however, granted for many years before 1874 the *reddendo* usually was a payment in money or grain. By the Clan Act (1 Geo. I., statute 2, c. 54, ss. 10, 11, and 12; Act of Sed., 10 March 1756) *quasi*-military services, such as hosting, hunting, watching, and warding, were abolished, and compensation therefor was provided to superiors; but the Act did not make it incompetent to stipulate in a feu-grant for the rendering of services which were not military or *quasi*-military in their nature. In feus in which the performance of agricultural services and carriages are stipulated for, the law is that these are exigible only if demanded within the year (*Young*, 1693, Mor. 13071; Duff, 83). Arrears of payment in kind may be exacted, however, at any time within the years of prescription, and such arrears are payable either in kind or at the market prices of the several years in which they fall due (*Duke of Hamilton*, 1835, 14 S. 162; *afid.* 1837, 2 S. & M.L. 586; and see *Hoppe*, 1872, 10 M. 347).

Interest is not due on feu-duty *ex lege*, but it may be, and now invariably is, stipulated for; and, apart from stipulation, it runs from the date of a judicial demand for payment (*Tweeddale*, 1842, 4 D. 862; *Tweeddale's Trustees*, 1880, 7 R. 620; *Napier*, 1831, 3 Ross' L. C., 109. Interest not due on ground-annuals *ex lege*—*Moncrieff*, 1835, 3 Ross' L. C. 109).

By secs. 20 and 21 of the Conveyancing Act, 1874, the power of commutation of carriages and services stipulated for under feu-rights has been conferred on the superior or the vassal. These sections provide:—

- (1) Where carriages and services, or any of them, exigible by the superior shall for any period of five years have been commuted to an annual money payment by agreement between the parties, whether reduced to writing or not, and whether express or implied from the conduct or actings of parties, and have not thereafter been exacted or performed, said annual payment shall thereafter be deemed to be the value in all time coming of such carriages and services respectively, and the superior shall be bound to accept the same (s. 20).
- (2) With respect to carriages and services which have not been so commuted, it shall be competent to either party to apply to the Sheriff within whose jurisdiction the lands lie to determine summarily the annual value thereof, and the determination of the Sheriff shall be final and not subject to review, and the superior shall be bound thereafter to accept of the annual sum so determined (s. 20).
- (3) The annual money value, where ascertained by agreement, may be stated in the memorandum in the form set forth in Sched. G annexed to the Act, or in a similar form, signed by the parties



or their respective agents; and on such memorandum, or the extract decree pronounced by the Sheriff, as the case may be, being recorded in the appropriate Register of Sasines, such annual money value shall be deemed to be feu-duty, with all the legal qualities thereof, and shall form an addition to any existing feu-duty, and the superior's right to the carriages and services shall be held to be discharged (s. 21).

- (4) Such discharge and commutation may be validly effected, although the lands are held under the fetters of any entail (s. 21).

The feu-duty is a real and preferable burden,—a *debitum fundi*,—and a vassal can only give a right to the lands subject to the feu-duty. By means of his real right in the lands the superior has a preference over purchasers in sales, voluntary or judicial, and in rankings of creditors, and this preference extends over the whole lands disposed in feu, however divided by subinfeudation or by sales (see Bell, *Prin.* 697, and authorities there cited). To preserve this preference, the feu-duty, being a real burden *inter naturalia* of the grant, does not require to enter the record, and in this way it differs entirely from an ordinary real burden (see Bell, *Lect.* ii. 1156).

The methods competent to a superior for compelling payment of feu-duty, and the subject of casualties, will be dealt with in the article SUPERIORITY.

(VI.) ASSIGNATION OF WRITS.—The statutory form of this clause in the transmission of a fee of property already created is: "And I assign the writs, and have delivered the same according to inventory" (31 & 32 Viet. c. 101, s. 5, and Sched. (B), No. 1); and it imports, unless specially qualified, "an absolute and unconditional assignation to such writs and evidents, and to all open procuratories, clauses, and precepts, if any, and, as the case may be, therein contained, and to all unrecorded conveyances to which the disponent has right" (*ib.* s. 8). This statutory form is not suited to an original feu-right, in which there should be a clause of assignation of writs but only to the effect of maintaining and defending the right of the grantee, and an obligation on the part of the superior to make them forthcoming on all necessary occasions. Where the vassal is to get right to any special obligation, such as an obligation of relief from stipend and augmentations of stipend contained in the superior's titles, the right requires to be specially assigned. If, however, a superior, in feuing, grants a clause of relief from minister's stipend and future augmentations in favour of his vassal, and his vassal disposes to a third party, that party will get the benefit of the obligation without special assignation thereof to him, on the ground that it is an inherent condition of the original grant, and therefore runs with the lands (*Stewart*, 1860, 22 D. 755; *affd.* 1863, 1 M. (H. L.) 25; *Lennor*, 1843, 5 D. 1357; and *Hope*, 1864, 2 M. 670). But if a vassal in transmitting his feu inserts such a clause of relief in favour of the purchaser, then, though the purchaser will have the benefit of it, neither his heir (unless he makes up his title by service) nor his disponee is entitled to found on the obligation of relief unless it has been specially assigned, because it is an obligation collateral to and irrespective of the title to the land (*Spottiswoode*, 1853, 15 D. 458; *Horne*, 1841, 3 D. 435; *rev.* 1842, 1 Bell's App. 1; *Sinclair*, 1844, 6 D. 378; *rev.* 1846, 5 Bell's App. 353. See 1 Ross' L. C. 50 *et seq.*). Prior to the Conveyancing Act, 1874, the form of assignation to obligations or rights of relief which did not pass under the general assignation of writs was as full and explicit as the assignation to an ordinary bond; but by sec. 50 of the Act a short

form of assignation has been introduced, and the assignation may be in a separate deed or form part of another deed. Sec. 50 provides—

“An assignation or conveyance of any obligation or right of relief or other right connected with lands, but the title to which does not, according to the present law, pass under the general assignation of writs in the disposition of the lands, may be granted in, or as nearly as may be in, the form of Sched. M hereto annexed, and may either be a separate deed or part of another deed, and shall have the effect of vesting in the person or persons in whose favour it is granted, and his or their successors, a valid and complete right and title to the obligation or right thereby assigned or conveyed, with all the intermediate transmissions thereof, to the same effect in all respects as if an assignation or conveyance in the form at present in use had been granted in his or their favour.”

Sched. M is as follows:—

I [*here insert the name and designation of the granter, and the cause of granting, unless the assignation forms part of another deed*] hereby assign to C. D. [*here insert the designation of the grantee, unless already given*], and his heirs and assignees [or, and his forebears], a disposition [*or other deed, as the case may be*] granted by [*here insert the names and designations of the persons by and in whose favour the deed to be assigned was granted, with its date, and also the date of registration, and the register in which it is recorded, if it has been recorded*], whereby the said [*name of the original granter of the disposition or obligation*] bound and obliged himself, his heirs and successors [*here insert the terms of the obligation in the terms so far as possible of the disposition or other deed, e.g.*], “to warrant the parsonage teinds of the lands of” [*here specify by description or reference, if not already done, the lands to which the obligation or right refers*] “from all future augmentations of minister’s stipend or other burden imposed or to be imposed upon the said parsonage teinds except the stipend presently payable to the minister of \_\_\_\_\_” [*or as the case may be. If the right to be assigned was originally granted in favour of some other person than the granter of the assignation, here specify the series of writs by which he acquired right, and add testing clause*].

By sec. 19 of the Titles to Land Consolidation Act, 1868, it was enacted that where a person should have granted or should grant a general disposition of his lands, whether by a conveyance *mortis causa* or *inter vivos*, or by a testamentary deed or writing, such disposition should be a sufficient warrant for a notarial instrument in favour of the disponee. The Court held, however, in the case of *Smith* (1869, 8 M. 204), that, to enable a person, other than the original disponee under a general disposition, to complete a title by a notarial instrument in terms of sec. 19 he required to have an assignation, general or special, of the general disposition. This decision, in respect that a general disposition does not usually contain an assignation of writs, made it incompetent to use two or more general dispositions as connecting links of a series of titles. The Conveyancing Act, 1874, to remedy this state of the law, provides by sec. 29—

“No decree, instrument, or conveyance under this Act, and no other decree, instrument, or conveyance, whether dated before or after the commencement of this Act, shall be deemed to be invalid because the series of titles connecting the person obtaining such decree, or expeding such instrument, or holding such conveyance, with the person last infeft, shall contain as links of the series two or more general dispositions, or because any general disposition forming a part of the series does not contain a clause of assignation of writs.”

It is worth noting that a clause, *e.g.* of relief of certain public burdens, in a conveyance may be so worded as not to be assignable to a disponee.

Thus, a Crown vassal disposed certain lands to King George III. and his royal heirs and successors, and the conveyance contained an obligation on the disponent to relieve His Majesty "and his royal heirs and successors" of certain burdens, and it was held that the obligation was in favour of the Crown alone, and not assignable to a vassal in part of the lands (*Orr-Ewing*, 1884, 11 R. 471; affd. 1884, 12 R. (H. L.) 12).

(VII.) ASSIGNATION TO RENTS.—The statutory form of this clause is: "And I assign the rents" (31 & 32 Vict. c. 101, s. 5, and Sched. (B), No. 1). This clause, unless specially qualified, is "held to import an assignation to the rents to become due for the possession following the term of entry, according to the legal and not the conventional terms, unless in the case of forehand rents, in which case it shall be held to import an assignation to the rents payable at the conventional terms subsequent to the date of entry" (*ib.* s. 8). Farms, in questions of rent, may be divided into two classes: (a) arable, and (b) pastoral; for where a farm is partly arable and partly pastoral it is considered as between seller and purchaser to be arable if the income or profits are chiefly derived from the arable land, and a pastoral farm if the income or profits are chiefly derived from the pastoral land (*Petley*, 1805, Hume, 186; *M'Clymonts*, 1848, 10 D. 1489; *Campbell*, 1836, 9 Sc. Jur. 163; Rankine on *Leases*, 318). Whatever be the conventional terms for payment of rent, the legal terms are: (a) in the case of arable farms, Whitsunday after the crop is sown, and Martinmas after the crop is reaped; and (b) in the case of pastoral farms, Whitsunday on entry and Martinmas thereafter. In the case of *Lord Glasgow's Trustees* (1889, 16 R. 545) a seller sold lands consisting of two arable farms, assigning the rents "due and payable from and after the term of entry," which was Martinmas 1886; and it was held, as regards the farm rents payable at Whitsunday 1887 for the crop and year 1886, that the proportion thereof for the period prior to Martinmas 1886 fell to the seller and the rest to the purchaser, and, as regards the rent of the shootings, which were let from 1 August 1886 to 31 March 1887, that the proportion of the rent for the period from 1 August to 11 November 1886 fell to the seller and the balance to the purchaser (see Rankine on *Leases*, 330, for other cases where statutory form of assignation not used).

Intimation to tenants of the assignation of rents in a feu-right or deed of transmission is not necessary after infeftment is taken (*Webster*, 1780, Mor. 2902). If infeftment is not taken, intimation of it should be made to the tenants. Such intimation will be sufficient to preclude the tenants from paying their rents to the granter of the deed containing the assignation (see *Flowerdew*, 1835, 13 S. 615); and by it a preference to the rents will be secured in a question with an arrester of the rents whose arrestment was used after the intimation, or with the holder of a subsequently intimated personal title. But the intimation of the assignation of the rents, although good to the extent mentioned, is liable to be defeated by the completion of a real right in the person of a creditor, or of another disponent, of the seller (*Huntly*, 1628, Mor. 2764; *Erskine*, 1748, Mor. 2901; *Menzies*, 558; *Bell*, *Lect.* i. 641).

Apart from the assignation to rents in a conveyance of land, the right to them follows the land, and where there is no assignation of the rents and no special provision on the subject of what portion of the rents is to belong to the seller and what to the purchaser, the purchaser becomes entitled to the rents of the estate for the possession that follows his term of entry, and the rents for the possession prior to that term belong to the seller (see *Ld. Pres. Inglis* in *Lord Glasgow's Trs.*).



(VIII.) **CLAUSE OF OBLIGATION TO RELIEVE OF PUBLIC BURDENS, ETC.**—The statutory form of this clause in a disposition is: “And I bind myself to free and relieve the said disponent and his foresaids of all feu-duties, casualties, and public burdens” (31 & 32 Viet. c. 101, s. 8, and Sched. (B), No. 1); and, unless specially qualified, it is held “to import an obligation to relieve of all feu-duties or other duties or services or casualties payable or prestable to the superior, and of all public, parochial, and local burdens due from or on account of the lands conveyed prior to the date of entry.” Whilst the statutory form of the clause may be used in an original feu-right, the form given in the style of the feu-charter above is preferable. The effect of the clause in either form is that the granter of the conveyance is not liable in a question with the grantee in payment of any public burdens imposed on the land, and due for the possession after the date of entry.

If a seller is due a casualty to his superior, a purchaser from him, in the absence of agreement to the contrary, is entitled now, as before 1874 (see opinions in *Straiton Estate Co. Limited*, 1880, 8 R. 299), to call on him to pay it before accepting a conveyance from him (*Gardiner*, 1799, Mor. 15037); and where a disponent with a clause of relief from casualties takes infestment and is thereby impliedly entered with the superior, and is found liable for a casualty exigible on account of the death of the last expressly entered vassal before the date of his disposition, he is entitled to claim relief from his disponent therefor (*Straiton Estate Co. Limited*, *supra*). Whether the disponent in this case would have been entitled to repayment, in the absence of a clause of relief, remains undecided (opinions for and against were expressed in *Straiton Estate Co. Limited*).

In feu-rights and deeds of transmission clauses of relief from public burdens imposed or to be imposed on the lands are not infrequent. Such clauses are interpreted so as to give effect to the meaning and intention of the parties as expressed in the contract (see *Duff*, 1883, 11 R. 126); and they will be construed by the actings of parties for a period of years if they are ambiguous (*Jopp's Trs.*, 1888, 15 R. 271). Such clauses are held, as a rule, not to include burdens imposed by laws enacted after the date of the obligation, inasmuch as these are presumed not to have been in contemplation at the time of entering into the contract. “Parties may no doubt,” said the late Ld. Robertson in *Scott* (1850, 12 D. 1077), “so frame a clause of relief that it shall embrace all burdens, whether the continuation of old taxes or their extension, or the creation of new taxes never dreamt of at the date of the contract. But clauses to have this effect must be very clearly expressed, and under such general words as ‘imposed or to be imposed’ total relief from new and unthought-of burdens is not to be presumed.” If, however, a public burden falling under a clause of relief is re-imposed by a Statute under which the object and the incidence of the burden are the same as under the former law, the burden so re-imposed is not considered a burden imposed by a supervenient law. Thus, in the case of *Dunbar's Trs.* (1877, 5 R. 350; *affd.* 1878, 5 R. (H. L.) 221), lands were feued in 1823 for the erection of a harbour, and the superior bound himself to relieve the vassal of the whole “cess or land tax, . . . ministers’ stipends, schoolmasters’ salaries, and other public burdens due and exigible out of the whole lands and subjects hereby feued, or that may become due and payable for or from the same in all time coming.” The vassals in 1877 claimed relief from poor-rates imposed on them as owners of the lands and buildings erected thereon under the Poor Law Amendment Act, 1845, and relief therefrom was granted on the ground that the poor-rate imposed by the Act of 1845 was in its object and incidence the same as the poor-rate

payable at the date of the contract, and therefore not a new burden for the relief of which the superior was not bound (see also *Lees*, 1857, 20 D. 6; *Hunter*, 1858, 20 D. 1311; *Paterson's Trs.*, 1863, 2 M. 234; *Nisbet*, 1869, 7 M. 881; *Preston*, 1870, 8 M. 502; *Wilson*, 1868, 6 M. 483). If, however, the incidence or the application of a burden is altered by a Statute so as to become a new burden, a clause granting relief from the former will not entitle to relief from the latter. "There may be," said Ld. Chan. Cairns in *Dunbar's Trustees*, "a burden existing at the date of the contract, and subsequently the incidence of that burden may be so altered that, although the burden *in specie* remains the same,—the same in name, and the same in application,—still a change subsequently made by law in the incidence of the burden may be such that it becomes, with reference to a contract of this kind, a new burden, and is no longer covered by the contract; or, on the other hand, the incidence of the burden may remain the same and yet the application of the burden may be so entirely different that the burden will become, although the same in name, yet a different burden *in specie*, and no longer be covered by the contract." Accordingly, where, at the date of the feu in the case of *Dunbar's Trs.*, the roads of the county were maintained under a local Statute Labour Conversion Act, providing for an assessment according to valued rent, leviable from owners in the personal occupation of their land, etc., and at the date when the action was raised by the vassals for relief from road assessment as well as poor-rates, the roads were maintained under an Act which abolished tolls, and assessed the whole sum required for the roads on owners and occupiers according to real rent, relief for the road assessment was refused to the vassals, because, although the burden was the same in name, and the object of the burden was the same as at the date of the feu, yet the incidence of the burden had been so entirely altered that it had become a new burden. For similar reasons a disponee (*Stewart*, 1876, 3 R. 518), under a disposition dated in 1861, with a clause of relief from "all schoolmaster's salary" from thenceforth and in all time coming, was held not entitled to relief from his disponent of school-rates imposed under the Education (Scotland) Act, 1872.

Most of the cases relating to clauses of relief from burdens imposed or to be imposed relate to relief claimed from augmentation of stipend, which is a burden on the teinds. "Warrandice," says Mr. Duff, "against payment of teinds and stipend does not protect against future augmentations, unless that term be used, or words admitting of no other construction. In construing a clause of this nature it is of importance to observe if the teinds do or do not belong to the disponee. If the former, then it will require very clear expressions to relieve him from future augmentations of stipend; but if the latter, warrandice simply against teinds and stipends seems necessarily to imply relief from present and future stipends. The reason is that as the surplus teind over what is payable to the minister belongs to the titular, and warrandice against payment of teinds relieves the disponee of the burden of payment to the titular of whatever that surplus consists of at the date of the conveyance, the burden so taken from the disponee cannot be revived, in whole or in part, by the modification of a larger stipend to the minister, who in effect thus merely takes away another portion of teind from the titular" (Duff, 89; and see *Cunninghame*, 27 Jan. 1829, F. C.; *Baird's Trs.*, 1830, 8 S. 622; *Wilson*, 1831, 9 S. 357; *Pedie*, 1839, 1 D. 871; *Horne*, 1843, 3 D. 435; *Lennox*, 1843, 5 D. 1357; *Paterson*, 1843, 5 D. 1313; *Stevenson*, 1858, 20 D. 651; *Stewart*, 1860, 22 D. 755; affd. 1863, 1 M. (H. L.) 25; *Hope*, 1864, 2 M. 670; *Campbell's*

*Trs.*, 1865, 4 M. 50; *Earl of Rosslyn*, 1865, 4 M. 140; *Preston*, 1870, 8 M. 502; *McCallum*, 1868, 6 M. 382; affd. 1870, 8 M. (H. L.) 1; *Reid's Trs.*, 1881, 8 R. 509).

The obligation to relieve of burdens imposed or to be imposed is not confined to the lands, but extends to all buildings erected thereon (*Dunbar's Trs.*; *Lees*; *Hunter*; *Paterson's Trs.*; *Nisbet*; *Preston*, all cited *supra*; and see *Smith*, 1876, 3 R. 281); nor is it affected or diminished by the vassal having sub-feued the lands to sub-vassals (see *Ld. Curriehill in Dunbar's Trs.*, *supra*, and *Montgomerie*, 1841, 3 D. 942; *Hunter*, *supra*); nor is it limited to the amount of the feu-duty, at least in cases where buildings or other improvements were in the contemplation of parties at the date of the grant (*Dunbar's Trs.*, *supra*). It has also been settled that an obligation of relief granted by a superior is binding on his successors in the superiority, but not on his general representatives, when he has simply bound himself and his heirs and successors to implement it (*Stewart*, *supra*). It has already been pointed out that where an obligation of relief is granted by a superior to a vassal it runs with the lands, but that when the relationship of superior and vassal does not subsist between the granter and grantee of such an obligation, the singular successors of the grantee require to have it specially assigned to them.

(IX.) CLAUSE OF WARRANTICE.—The statutory form of this clause in a disposition is: "And I grant warrantice" (31 & 32 Vict. c. 31, s. 5, Sched. (B), No. 1), and it, unless specially qualified, is "held to imply absolute warrantice as regards the lands, and writs, and evidents, and warrantice from fact and deed as regards the rents" (*ib.* s. 8). The clause in its statutory form is as applicable to an original feu-right as to a deed of transmission. If there is no clause of warrantice in a conveyance of heritage, absolute warrantice is implied if a full price has been paid (*Bell, Prin.* 894), but it will be noted that where the deed, in which a clause of warrantice in its statutory form occurs, relates to heritage, then, whether it is onerous or gratuitous, the warrantice is absolute as regards the lands, and writs, and evidents, and from fact and deed as regards the rent. The obligation created by the clause against the granter is to indemnify the grantee in case of the conveyance in his favour being reduced or of his being evicted from the subjects, in whole or in part, on any ground not attributable to the grantee, and to warrant that the rents are due, but not that the tenants are solvent. But absolute warrantice, express or implied, does not, in the absence of agreement to the contrary, protect the grantee against losses or burdens caused by supervenient laws (*Watson*, 1667, Mor. 16588; *Muirhead*, 1715, 5 Bro. Supp. 125; *Elphinstone*, 1663, Mor. 16585; *Bonar*, 1683, Mor. 16606), nor against losses and burdens natural to the right (*Drummond*, 1549, Mor. 16565; *Cunninghame*, 1829, S. Teind Cases, 175; *MacRitchie's Trs.*, 1836, 14 S. 578; *Bell, Prin.* 895), or arising from the nature or legal effects of ownership (*Lumsden*, 1682, Mor. 16606; *Plenderleath*, 1800, Mor. 16639), nor from servitudes, unless of a very burdensome sort, although in practice the best course is to exempt servitudes from the warrantice (*Urquhart*, 1835, 13 S. 844; *Gordonston*, 1682, Mor. 16606; *Sandilands*, 1672, Mor. 16599; *Spynington*, 1780, Mor. 16637; *Reid*, 1822, 1 S. 334). Nor does it entitle him to claim the discharge of an old right of real warrantice on which action has not been threatened (*Durham's Trs.*, 1800, Mor. 16641; but see *Bell, Lect.* i. 218). Absolute warrantice under a deed dealing with heritage warrants possession of the subjects conveyed by the dispositive clause, and warrants the assignation of writs for the purpose for which they are assigned, *i.e.*



the purpose of maintaining the grantee in possession of what the dispositive clause conveys (*Brownlie*, 1878, 5 R. 1076; *affd.* 1880, 7 R. (H. L.) 66).

A grantee who is in right of absolute warrandice can recover the full damage sustained by him on eviction (*Cairns*, 1870, 9 M. 284; *Carmichael*, 1821, 1 S. 25; *Galloway*, 1838, 1 D. 74; *Houston*, 1717, Mor. 16619; *Hill*, 1769, Mor. 16631); but it is not decided whether, when the subject has fallen in value, the grantee is entitled only to the value as at the time of eviction, or to the price paid by him for it (see *Cairns*, *supra*). Action of recourse, in virtue of a right of warrandice, arises after eviction takes place; but it is also competent when eviction is threatened: (1) if eviction is threatened on a ground which is unquestionable and which proceeds from the fault of the granter, *e.g.* where he has made double grants of the same subject in favour of different parties (*Smith*, 1672, Mor. 16596; *Ersk.* 2. 3. 30; *Bell*, *Prin.* 895); or (2) if the party against whom the action lies disputes his liability to relieve in the event of eviction (*Melville*, 1842, 4 D. 385; and see *Ld. Ormidale* in *Leith Heritages Co.*, 1876, 3 R. 789).

Threatened eviction ought in all cases to be intimated to the party liable in the event of eviction. If the purchaser defends and is successful, he has no claim in virtue of his warrandice to the expense of his defence (see *Stair*, ii. 3. 46; *Bell*, *Lect.* i. 219; *Inglis*, 1771, Mor. 16633); but if he defends and omits no competent defence, and is unsuccessful, he has a claim for the expenses of the action against the party bound in warrandice (see *Bell*, *Lect.* i. 219). If, however, he defends and omits a competent defence, and is unsuccessful, he loses his right of recourse (*Clerk*, 1681, Mor. 16605; and see *Bell*, *Prin.* 895).

When there are any leases of part of the lands feued in a feu-right or disposed in a disposition, it is the proper practice to except them from the warrandice clause (*Jurid. Styles*, i. 31, 119; and see *Bell*, *Lect.* i. 644).

When trustees feu or otherwise dispose land for a full price, the form of the warrandice clause granted by them is as follows: "And we, as trustees foresaid, warrant these presents from our own facts and deeds only, and bind and oblige the trust estate under our charge, and the parties beneficially interested therein, in absolute warrandice" (*Jurid. Styles*, i. 31). A trustee, infest in certain subjects, after consenting to certain bonds being granted by his author over the subjects, granted a bond and disposition in security for a new loan, which he bound himself "as trustee" to repay, and, in security of the personal obligation, he, "as trustee," disposed the subjects, and granted a clause of warrandice in these terms: "I grant warrandice." The holder of this bond raised an action against the representative of the trustee, in which it was held that the trustee was personally bound at least in warrandice from fact and deed, and accordingly that he was liable for loss arising from the prior bonds to which he was a consenter, because warrandice from fact and deed infers a protection against eviction by reason of the granter's own act or omission, past or future; and it was questioned, but not decided, whether the trustee, in respect of the clause of warrandice granted by him, was not personally liable in absolute warrandice (*Horsburgh's Trs.*, 1886, 14 R. 67).

(X.) CLAUSE OF REGISTRATION.—The statutory form of this clause in a disposition is: "And I consent to registration hereof for preservation" (31 & 32 Vict. c. 101, s. 5, Sched. (B), No. 1), and it imports, unless specially qualified, a consent to registration and a procuratory of registration in the Books of Council and Session, or other judges' books competent, therein to remain for preservation (31 & 32 Vict. c. 101, s. 1:8). This form is quite

applicable to an original feu-right: but whereas a disposition or Crown charter can be recorded either "in the Books of Council and Session or other judges' books competent," a feu-charter by a subaltern superior can be recorded for preservation under the Statute 1693, c. 35, only in the Books of Council and Session (*Jurid. Styles*, i. 32; Bell, *Loc. cit.* 645). But if a feu-charter, with a clause of consent to registration for preservation, is presented for registration in the Register of Sasines, with a warrant of registration specifying that the writ is to be registered for preservation as well as for publication, and is recorded therein, such registration is held to be registration also in the Books of Council and Session for preservation (31 & 32 Vict. c. 64, s. 12).

(XI.) TESTING CLAUSE, of which nothing need be said here.

The question has now to be discussed, on the assumption that the granter of a feu-charter is feudally infest: How can the grantee under it now complete a feudal title in his person?

If a feu-charter contains (a) a general description of the lands; or (b) a particular description of them; or (c) a description of them by statutory reference; or (d) a description of them by general name in terms of sec. 13 of the Titles to Land Consolidation (Scotland) Act, 1868, the grantee can complete his title—

- (1) *By having the feu-charter recorded, with a warrant of registration in the form of Sched. (H), No. 1, of the Titles to Land Consolidation Act, 1868, in his favour, in the division of the General Register of Sasines applicable to the lands therein contained* (31 & 32 Vict. c. 101, s. 15, and Sched. (H)).

Sched. (H), No. 1, is as follows:—

Register on behalf of A. B. [*insert designation*], in the register of the county of C. [*or if the conveyance, etc., or writ, contains lands in more than one county, in the registers of the counties of C., D., E., and F., or, if the lands be held burghage, in the register of the burgh of M., or in the registers of the burghs of M., N., O., and P.*] [*or register, etc., along with assignation (or assignations) [or writ of resignation] hereon, in the register of the county of C., etc., or in the register of the burgh of M., etc., or otherwise as the case may be*].

(Signed)

A. B.,

[*or*] G. H.,

W.S., Edinburgh, agent,

[*or*] J. K. & L.,

W.S., Edinburgh, agents

[*or as the case may be*].

The warrant may be signed either by the grantee or grantees, or by his or their agent or agents, and in the latter case the warrant may be signed either by an individual agent or by the subscription of any firm of which such agent may be a partner. If such feu-charter contains a clause of direction, and it is desired to put on the Register of Sasines only those parts directed by the deed to be recorded, the warrant of registration will be in the form of Sched. (F), No. 2, of the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 12).

Sched. (F), No. 2, is in these terms:—

Register the above deed in terms of the clause of direction therein contained on behalf of A. B. [*insert designation*] in the register of the county of C. [*or if the writ contains land in more than one county, in the*

registers of the counties of C., D., E., and F., or, if the lands be held burghage, in the register or registers of the burgh of M., or burghs of M., N., O., and P.]

(Signed)

A. B.,  
[or] G. H.,  
W.S., Edinburgh, agent,  
[or] J. K. & L.,  
W.S., Edinburgh, agents  
[or as the case may be].

- (2) Or, by having expedé and recorded, with a warrant of registration in the form of Sched. (H), No. 1, in his favour, in the division of the General Register of Sasines applicable to the lands therein contained, a notarial instrument in the form of Sched. (J) of the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 17).

Sched. (J) runs :—

At there was by [or on behalf of] A. B. of Z., presented to me, notary public subscribing, a disposition [or other deed, or an extract of a deed, as the case may be], granted by C. D. of Y., and dated [insert the date], by which disposition [or otherwise as the case may be], the said C. D. sold, alienated, and disposed to the said A. B. [or gave, granted, and disposed, or otherwise, as the case may be, to the said A. B. [or to E. F.], and his heirs and assignees [insert the destination, if any, so far as may be necessary], heritably and irredeemably [or redeemably, or in life-rent, or otherwise as the case may be], All and Whole [insert the description of the lands conveyed, and any real burdens, conditions, provisions, and limitations, or any reference to the same, all as in the disposition or the deed, etc.] [If the person expeding the instrument be other than the original disponee, add], As also there was presented to me [here specify the title or series of titles by which such person acquired right, and the nature of his right]. Whereupon this instrument is taken in the hands of L. M. [insert name and designation of notary public] in the terms of the "Titles to Land Consolidation (Scotland) Act, 1868." In witness whereof [insert testing clause as in Sched. (I)].

If, on the other hand, the feu-charter contains (e) a description of the lands in general terms, or (f) a description of them by reference not in statutory form, the grantee cannot record the charter, but he can complete his title—

- (1) By having expedé and recorded, with a warrant of registration in the form of Sched. (H), No. 1, in his favour in the division of the General Register of Sasines applicable to the lands therein contained, a notarial instrument in the form of Sched. (L) of the Titles to Land Consolidation Act, 1868 (31 & 32 Vict. c. 101, s. 19).

Sched. (L) is as follows :—

At there was by [or on behalf of] A. B. of Z., presented to me, notary public subscribing, a disposition [specify the disposition or other deed or instrument or extract thereof, as the case may be] recorded in the [specify Register of Sasines and date of recording], by which recorded disposition [or otherwise as the case may be] C. D. of Y. was infeft in All and Whole [describe the lands or other subjects, as the case may be, as the same are described in the said disposition or other deed or instrument]; as also there was presented to me a general disposition [or other deed or conveyance or testamentary deed or writing, as the case may be, or an extract of such deed] granted by the said C. D., and dated [insert date], by which general disposition [or otherwise as the case may be] the said C. D. disposed [or gave or granted or bequeathed, or otherwise as the case may be] to the said A. B. and his heirs and assignees [or otherwise as the case may be], heritably and irredeemably [or in life-rent, or otherwise as the case may be],



all and sundry the whole heritable estate [or otherwise as the case may be], of which he was [or might die] possessed [or otherwise as the case may be]. [If the deed be granted under any real burden or condition or qualification, add here, but always under the real burdens, etc.; and if the deed be granted in trust, or for specific purposes, add, but always in trust or for the uses and purposes mentioned in said general disposition, or otherwise as the case may be. If the person expeding the instrument be other than the original disponent, or grantee, or legatee under the deed, add, as also there was presented to me (specify the title or series of titles by which such person acquired right, and the nature of his right)]. Whereupon, etc., as in Sched. (J) to the end.

The above methods of completing a grantee's title under a feu-charter have been in use since the commencement of the Titles to Land Consolidation Act, 1868. For some time after the commencement of that Act it was competent to record a feu-charter or other writ either in the Particular Register of Sasines applicable to the lands or in the General Register of Sasines; but by sec. 8 of the Land Registers Act, 1868 (31 & 32 Vict. c. 64, s. 8), it was ordained that the Particular Registers of Sasines should be discontinued not later than the 31st December 1871.

A feu-right or a deed of transmission may still contain a precept of sasine either in the form in use before the Infefment Act, 1845, or in the form introduced by that Act. Although there is a precept in the deed, infefment may be taken as above described, or an instrument of sasine may be expedite and recorded. Whatever the form of the precept, the instrument of sasine may be in the form introduced by the Infefment Act, 1845; but if an instrument of sasine in the form in use prior to 1845 is to be expedite, the deed must have a precept in the form in use prior to that date, and the instrument must be preceded by symbolical delivery on the lands, and followed by registration within sixty days of its date.

In connection with the taking of infefment, these points require to be kept in view:—

- (1) All writings whatsoever which may be recorded in any Register of Sasines require to have warrants of registration signed by the party on whose behalf it is desired to record them, or by his agent, and in the latter case the warrant may be signed either by an individual agent, or by the firm of which such agent is a partner (37 & 38 Vict. c. 94, s. 33, and 31 & 32 Vict. c. 101, ss. 15, 141).
- (2) Writs affecting land held burgage prior to the commencement of the Conveyancing Act, 1874, are recorded in the Burgh Register, and writs affecting lands in Paisley held by booking tenure prior thereto are recorded in the Register of Booking at Paisley: whereas writs affecting lands not so held are recorded in the appropriate division of the General Register of Sasines (37 & 38 Vict. c. 94, s. 25).
- (3) The General Register of Sasines in Edinburgh and the Particular Registers of Sasines were established by 1617, c. 16: and the Statute of 1693, c. 13, declared all infefments preferable according to the date and priority of registration. The Particular Registers of Sasines were abolished, as stated above, by the Land Registers Act, 1868: and the General Register of Sasines has been kept from and after 31 December 1868 in terms of that Act, the chief provisions of which are as follows: (a) The writs applicable to each county have to be entered in a separate series of presentment books; minuted in a separate series of minute-books, and engrossed in a separate series of register volumes in the

order of presentment. (b) Where any writ contains land in more than one county, such writ requires to be entered by the ingiver in the presentment book of such of these counties as may be specified in the warrant of registration, minuted in the minute-book of such of these counties or county as are specified in the warrant, and engrossed at length in the division of the register applicable only to one of the counties, and a memorandum requires to be entered in each division of the register applicable to the other counties or county in the presentment book of which it is entered, setting forth the volume of the register, and the folio or folios of such volume in which such engrossment is made, such memorandum being deemed to be equivalent to full engrossment of such writ in the division of the register wherein such memorandum is entered (s. 3). (c) Where any writ containing lands or heritages in more than one county has not a warrant of registration endorsed or written thereon applicable to all the counties to which it applies, the registration of such writ shall notwithstanding, as regards the county or counties mentioned in the warrant and in the minute-books and register volumes of which county or counties it has been recorded, or a memorandum thereof entered, be effectual, and it shall be competent afterwards to present such writ by a new warrant of registration thereon, and to minute and register such writ in the register of any other county or counties to which such writ applies, in terms of such new warrant, and in the case of such subsequent registration it shall not be necessary to engross the writ at length in the division of the register applicable to such county or counties, but the same may be effected by the insertion of a memorandum in such division of the register in the manner set forth in sec. 3 of the Act, and such subsequent registration shall be effectual as regards the county or counties to which such writ applies, and to which such new warrant is applicable, of and from the date of such subsequent registration (s. 5). (d) Where any writ is transmitted by post for registration in the General Register of Sasines the keeper shall, upon the receipt of such writ, cause the same to be acknowledged to the sender, and to be presented in terms of the warrant of registration thereon by a clerk in his office, to be appointed by him for that purpose, and who shall be held as the ingiver of the writ, and such writ shall be recorded in the same manner as any other writ presented for registration; and where two or more writs transmitted by post shall be received by the keeper at the same time, the entries thereof in the presentment book and minute-book shall be of the same year, month, day, and hour, and such writs shall be deemed and taken to be presented and registered contemporaneously (*ib.* s. 6; and 31 & 32 Vict. c. 101, s. 142). (e) No error or omission in any presentment book of the General Register of Sasines to be kept in accordance with the Act shall invalidate or in any way affect injuriously the registration of any writ recorded in the register (s. 7). (f) It shall not be necessary to register in the Books of Council and Session for the purpose of preservation, or of preservation and execution, any writ competent to be registered in the General Register of Sasines, and which shall have been so registered, and such writ, being registered in the Register of Sasines,

shall be held to be registered also in the Books of Council and Session for preservation, or for preservation and execution, as the case may be, provided that (1) such writ when presented for registration in the Register of Sasines shall have in the warrant of registration an addition specifying that the writ is to be registered for preservation, or for preservation and execution, as well as for publication; and (2) that no writ shall be held to be registered for the purpose of execution which does not contain a procuratory of registration, or clause of consent to registration for the purpose of execution in the body of the writ. Such registration shall have all the legal effects of registration in the Books of Council and Session for preservation, or for preservation and execution, as the case may be, as well as of registration in the General Register of Sasines; and all extracts of a writ so registered, and the warrants of execution therein contained, shall have all the like force and effect as any extract from the Books of Council and Session (see *ib.* s. 12; 31 & 32 Vict. c. 101, ss. 138, 141). On the preamble that the alterations of the boundaries of certain counties made by order of the Boundary Commissioners for Scotland in pursuance of the Local Government (Scotland) Act, 1889 (52 & 53 Vict. c. 50), would affect the registration of writs in the appropriate divisions of the General Register of Sasines for Scotland, the Registration of Certain Writs Act, 1891 (54 Vict. c. 9), enacted (s. 1) that the following provisions should have effect with respect to the registration of writs in the General Register of Sasines: (1) the Orders of the Boundary Commissioners made or to be made in pursuance of the Act of 1889, notwithstanding the dates specified in such Orders, and notwithstanding the confirmation of any of such Orders as provided in the Act, should, for the purpose of regulating the registration of writs in the appropriate divisions of the General Register of Sasines, and for that purpose only, come into operation on, but not before, 15 May 1892; (2) it should not be necessary that separate divisions of the General Register of Sasines be kept for the counties of Orkney and Zetland; (3) all enactments in this or any other Act, and anything done thereunder affecting the registration of writs relating to any lands in Scotland, should be taken to apply to the registration of writs relating to the teinds of such lands; and (4) nothing contained in the Act should invalidate any writ recorded in the General Register of Sasines before the passing of the Act, or affect injuriously any rights depending on such writs, or, except in so far as therein expressly provided, interfere with the operation of any Order of the Commissioners. (For the boundaries of counties and parishes in Scotland as they exist now, see *The Boundaries of Counties and Parishes in Scotland*, by Hay Shennan, Advocate.) It may be proper, with regard to all writs dealing with subjects affected by the new boundaries made by the Commissioners, that they should describe the subjects as being, *e.g.*, formerly in the county of A., and now in the county of B. There was passed in 1871 an Act (34 & 35 Vict. c. 68) to remove doubts as to the barony and regality of Glasgow, which for the purposes of the Lands Register Act, 1868, falls to be treated as a county.

- (4) In case of any error or defect in any instrument, or in the recording of any deed or conveyance, or of any warrant of registration recorded



or to be recorded in any Register of Sasines, or in any warrant of registration thereon, or in the recording of such warrant, it shall be competent of new to make and record such instrument, or of new to record the deed or conveyance with the original or a new warrant of registration, as the case may require (31 & 32 Vict. c. 101, s. 143).

- (5) Unless it is averred and proved that erasures in instruments of sasine and other instruments have been made for the purpose of fraud, or the record thereof is not conformable to the instruments as presented for registration, such instruments are not challengeable on the ground that any part of them is written on an erasure (6 & 7 Will. IV. c. 33, and 31 & 32 Vict. c. 101, s. 144); and no challenge of any deed, instrument, or writing recorded in any Register of Sasines shall receive effect on the ground that any part of the record of such deed, instrument, or writing is written on erasure, unless such erasure be proved to have been made for the purpose of fraud, or the record is not conformable to the deed, instrument, or writing as presented for registration (37 & 38 Vict. c. 94, s. 54).
- (6) Extracts of all conveyances or deeds, warrants of registration, and instruments recorded in the Register of Sasines make faith in all cases as the recorded conveyances or deeds, warrants, and instruments themselves would have done, except where any such conveyance or deed, warrant, or instrument so recorded shall be averred to be forged (31 & 32 Vict. c. 101, s. 142).

**BLENCH-CHARTER.**—The blench-charter is now seldom used. The only differences between it and the feu-charter are that the dispositive clause states that the lands are “in blench-farm,” instead of in feu-farm, disposed, that the clause of *tenendas* states that the subjects are to be held of the granter in free blench-farm, fee, and heritage for ever, and that the clause of *reddendo* stipulates for payment of an illusory duty, *e.g.* one penny Scots, if asked only (*Jurid. Styles*, i. 34).

**FEU-DISPOSITION.**—Instead of the feu-charter, the form of the disposition with a holding *de me* was sometimes used to constitute a feudal fee; but in form the feu-charter and the disposition are now the same (*Jurid. Styles*, i. 35; Menzies, 635).

**FEU-CONTRACT.**—Unlike the feu-charter, blench-charter, and feu-disposition, the feu-contract is a bilateral deed, and it is used when parties wish to be able to enforce by direct personal diligence on it the obligations undertaken under the deed. It contains all the ordinary clauses of a charter and an express obligation to pay and perform the several duties and obligations due to the superior, and a clause of registration in which both parties consent to registration for preservation and for execution (*Jurid. Styles*, i. 35).

**Feudal System.**—The system of land rights, now existing in Scotland, is based on the feudal system, which was introduced into Scotland before the end of the eleventh century. The system has since been greatly modified in its operation and details by successive enactments (for origin, history, and modifications of the feudal system, see Stair, 2. 3. 1; Ersk. 2. 2. 1; Ross, *Lect.* ii. 1; Menzies, 502;

Bell, *Lect.* i. 561; Duff, 43); but these enactments have not affected the principle of the system, which is, that lands, with certain exceptions (see ALLODIAL), are held directly or indirectly of the Crown. Professor George Joseph Bell states the principle and the application of our present system of land rights thus: "The property of land in Scotland is held either directly and immediately under the Crown as paramount superior of all feudal subjects; or indirectly, either as vassal to some one who holds his land immediately from the Crown, or as sub-vassal in a still more subordinate degree. The two separate estates of superiority and vassalage are held reciprocally either by the sovereign and his immediate vassal, or by the sovereign's immediate vassal and his vassal under him; or successively by vassals still lower, down to the last step of the ownership of land" (Bell, *Prin.* s. 675). The holder of land may thus be both a vassal and a superior, —a vassal as regards the granter of his right, a superior as regards the grantee to whom he has sub-feued. But this distinction is to be noted between a feudal grant made by the Crown to a vassal, and one made by a vassal to a sub-vassal, that the fee of superiority created in favour of the Crown is allodial, *i.e.* enjoyed independent of any superior, whereas the fee of superiority in favour of any subject is not allodial, as he must hold either immediately or mediately of the Crown (Ersk. 2. 3. 8).

Unless effectually prohibited by a condition made prior to the commencement of the Conveyancing Act, 1874 (37 & 38 Vict. c. 94), subinfeudation may go on *ad infinitum*. Conditions against subinfeudation generally have as their object the making exigible of a casualty on the occasion of each sale or transfer, as well as on the death of a vassal. All conditions made after the commencement of the Act to the effect that it shall not be lawful to the proprietor of lands to sub-feu the same, to be holden of himself as immediate lawful superior thereof, are declared by sec. 22 of the Act null and void, and not capable of being enforced; and all enactments to the contrary of, or at variance with, this enactment are by the same section repealed. Nothing in the Act of 1874, however, validates any sub-feu in cases where subinfeudation had been, prior to the Act, effectually prohibited (37 & 38 Vict. c. 94, s. 4 (2)).

A grant by the Crown, or by a vassal, or by a sub-vassal, does not deprive the granter of a legal estate in the lands forming the subject of the grant. The granter retains the radical right to the subjects disposed, because there is not, as has been observed, an absolute or total cession of the subjects in any feudal grant, in respect that the granter, or the law for him, reserves an interest in it (Ersk. 2. 3. 7). Thus, when the Crown makes a grant of lands to a vassal, it retains a radical right to the lands, which is called the *dominium directum* or superiority, and the grantee or vassal acquires the subordinate right of property, or the *dominium utile*, of the lands; and similarly, when a vassal, holding either mediately or immediately of the Crown, makes a grant to another of the lands acquired by him from the Crown, the granter retains the *dominium directum* or superiority of them, and the grantee acquires the right of property, or the *dominium utile*, in them, and the relationship of superior and vassal is, by the grantee's infestment in the feu, constituted between the granter and the grantee. The granter of the feudal right is called the superior, because, with regard to his grantee or vassal, he stands in a higher rank (Ersk. 2. 3. 10); and the interest which is reserved to the granter is called the *dominium directum*, because it is, in a feudal sense, the more eminent right. The interest which the grantee acquires is called *dominium utile*, which, if

subordinate to the *dominium directum*, is yet the more profitable of the two (*ib.*; see also Stair, 2. 3. 7; Duff, 45, 55; *Jurid. Styles*, i. 4). The right to the *dominium directum* empowers the superior to exact implement of the conditions, express or implied, of the grant; and the right to the *dominium utile* carries with it the exclusive possession and enjoyment of the lands contained in the grant, so long as the conditions of it are fulfilled by the grantee. The term "fee" is applied both to the *dominium directum* and the *dominium utile* (Ersk. 2. 3. 10). Where the *dominium utile* has not been separated from the *dominium directum*, or, having been separated, has been reunited with it, the interest of the proprietor in the lands is sometimes called *dominium plenum*.

While it was lawful for a vassal to grant sub-feus when he was not prohibited from doing so by a condition against subinfeudation (see Ersk. 2. 5. 7), he could not, in ancient times, substitute a stranger in his place without the consent of his superior (see Ersk. 2. 7. 8; Menzies, 609; and Duff, 143, on the doubtful Statute 2 Rob. i. c. 24). But this rule was first modified, and then abolished. By an Act of Alexander I., the Sheriff was empowered to sell a debtor's lands on fifteen days' notice when his moveables were insufficient to pay his debts, and the purchaser of the lands was entitled to hold them of the debtor's superior (Thomson, *Acts of Parliament*, i. 371; Bell, *Lect.* vol. i. 571). This Act having fallen into abeyance, it was successively enacted that creditors-appraisers (1469, c. 36), adjudgers (1672, c. 19), and purchasers of bankrupts' lands at judicial sales (1681, c. 17), should be entitled to entry with the superiors on payment of a year's rent of the lands. After the passing of the Acts 1469, c. 36, and 1672, c. 19, purchasers often adopted the method of going through the form of appraising or adjudging the sellers' lands, and thereafter, as creditors-appraisers or adjudgers, demanding entry from the superiors (see Bell, *Lect.* vol. i. 572; Ersk. *Prin.* 2. 7. 3; Menzies, 610). Even before the passing of the Acts 1672, c. 19, and 1681, c. 17, "the Crown, under a sense of the unsuitableness of the feudal fetters to the exigencies of advancing freedom and commerce, had adopted a liberal course toward its vassals, having laid down the rule, as appears from 1578, c. 66, to grant confirmation upon payment of expenses by the party" (Menzies, 610). Another Statute (1685, c. 22), which first legalised entails, made it lawful "to His Majesty's subjects to tailzie their lands and estates, and to substitute heirs in their tailzies"; but the Act declared that nothing in it should prejudice a superior's right to his casualties of superiority. The state of the law against alienation, as opposed to subinfeudation, led also at an early period to another device by which the effect of it in practice was modified. A vassal whose desire was to substitute his disponent in his place, and not to create a permanent relationship of superior and vassal between himself and his disponent, granted two charters or conveyances to his disponent, the one with an obligation to infeft *a me*, and the other with an obligation to infeft *de me*. On these two deeds an instrument of sasine was expedited, which by its terms could be held to proceed on either. In virtue of the *de me* holding, the instrument of sasine, when recorded in the appropriate Register of Sasines, gave the disponent a valid title to the *dominium utile*, with the seller as his immediate superior. As soon as the superior of the vassal who had sold his lands recognised the disponent as a vassal, the infeftment was ascribed to the *a me* holding, and the deed with the holding *de me* was dropped from the progress of titles. Afterwards the custom came to be that a vassal gave to his disponent, instead of two deeds, a



disposition containing an obligation to infeft *a me de superiøre meo vel de me*, or, as it came to be put, *a me vel de me*. Infeftment on such a deed secured to the disponee a feudal title to the property, and created a mid-superiority in favour of the disposer, and on the disponee's recognition by the superior the seller was divested of the mid-superiority, and the disponee invested with it. See DISPOSITION. A superior recognised or entered his vassal's disponee by granting a charter or writ by progress. The writ by progress, down to the passing of the Titles to Land Act, 1858, was a charter of confirmation or a charter of resignation, or a combined charter of confirmation and resignation, and thereafter, till the commencement of the Conveyancing Act, 1874, a charter or writ of confirmation, or a charter or writ of resignation. The circumstances in which the charter or the writ of confirmation, and the charter or the writ of resignation, and the combined charter of confirmation and resignation, were used, are pointed out in the article DISPOSITION. But it may be well to notice here that although entry granted to the disponee of a vassal by confirmation or by resignation was common in practice prior to 1747, a disponee, as such, was not entitled to force an entry with the superior until that year, when a Statute was passed which provided that any person purchasing or acquiring lands from the former proprietor or vassal who was duly vested and seised therein, and obtaining from such vendor or former proprietor a disposition or conveyance containing a procuratory of resignation, should be entitled to charge the superior in the lands to grant new infeftment to such person (20 Geo. II. c. 50, ss. 12 and 13). This Statute, it will be observed, gave a purchaser with a disposition containing procuratory of resignation right to compel an entry by resignation only. But by the Lands Transference Act, 1847 (10 & 11 Vict. c. 48, s. 6), superiors could be compelled to grant entry by confirmation: for sec. 6 of that Act provided that where any person should be infeft in lands or heritages in Scotland holden of a subject-superior, on a disposition containing an obligation to infeft *a me* or *a me vel de me*, and granted by the person last entered and infeft, or granted by a person whose own title was capable of being made public by confirmation according to the law and practice then existing, it should be competent to charge the superior to grant in favour of such person an entry by confirmation. Entry by resignation or by confirmation has been incompetent since the commencement of the Conveyancing Act, 1874. By sec. 4 (1) of the Act it is provided, with regard to lands which have been or may be feued: "It shall not, notwithstanding any provision, declaration, or condition to the contrary in any Statute in force at the passing of this Act, or in any deed, instrument, or writing, whether dated before or after the passing of this Act, be necessary in order to the completion of the title of any person having a right to the lands, in whole or in part, whether such right shall have been acquired by succession, bequest, gift, or conveyance, that he shall obtain from the superior any charter, precept, or other writ by progress; and it shall not be competent for the superior in any case to grant any such charter, precept, or other writ by progress: provided always that nothing in this Act contained shall prevent the granting of charters of *novodamus*, or precepts or writs from Chancery, or of *clare constat*, or writs of acknowledgment." As soon as a disponee takes infeftment, he is, in accordance with sec. 4 (2) of the Act of 1874, held, as at the date of the registration of his infeftment in the appropriate Register of Sasines, to be duly entered with the nearest superior whose estate of superiority in such lands would, according to the law prior to the Act, have been not defeasible at the will of the proprietor so infeft.

and that whether the superior's own title or that of any over-superior has been completed or not.

Feudal grants, according to the law of Scotland, have been distinguished from one another according to the different tenures or manners of holding under which the vassals hold them. The following tenures or holdings have been recognised in our system of conveyancing: (1) Ward; (2) Socage; (3) Mortmain or Mortification; (4) Feu; (5) Blench; (6) Burgage; (7) Booking. Of these tenures, Ward, Socage, and Mortmain or Mortification no longer exist. The tenures of Feu, Blench, Burgage, and Booking still exist. The seven different tenures will be fully treated under TENURES.

### **Feu-Duty.**—See FEU-CHARTER.

**Fiar**, in contradistinction to liferenter, is the person in whom is vested the property of the estate, burdened with the liferent. See LIFE-RENT; also CONJUNCT RIGHTS.

**Fiars Prices.**—Fiars prices is the term used to indicate standard prices of grain annually fixed by the Sheriff, the objects being to settle the rate at which the stipend of the parochial clergy and any other money payments referable to the current value of agricultural produce are to be converted into money. The term “fiar” has no relation with the same word signifying an owner of heritable property, but is identical with the Middle English *feor*, Old French *feur*, a price, being a derivative from Latin *forum* in the sense of a market, and thence a market price. The word “affeer,” to fix a price, also occurs, but is not to be confused with *affeer* or *effeer*, a term still in use in Scots legal phraseology, meaning to pertain. The word “fiars” thus signifies market prices, and is used in that sense in the Act 1584, c. 22 (“appoint certane and indifferent and comoun prices als neir as may be to the feiris of the cuntreis”).

One of the earliest objects of fiars was to fix the money conversion of rents payable in grain, where such conversion had not been fixed in perpetuity by the agreement of parties; and as the Sheriff was then a fiscal officer of the Crown, it was his duty to fix the prices at which such Crown rents were to be converted; hence, no doubt, the origin of the expression *Sheriff-fiars*. Owing to complaints of irregularities in the method of striking the fiars, an Act of Sederunt was passed in 1723 which provided that the Sheriff should strike the fiars before March 1st in each year. The procedure was to summon a jury of fifteen (of whom eight should be heritors), and also witnesses who had been engaged in sales of grain; but the jury could also act on their own knowledge. There is considerable doubt whether the Court of Session had any jurisdiction to pass this Act, as the authority of the Sheriff to strike the fiars must have emanated from the Exchequer. In the case of *Howden v. E. of Haddington* (1851, 13 D. 522), the Court of Session refused to interfere where the fiars had been struck for a long period in a manner entirely different from the procedure of the Act of Sederunt.

The application of fiars prices for payment of stipend of the parochial clergy was not invariable till the Act 48 Geo. III. c. 138 provided that stipend was to be converted into money at “the highest fiar prices.” The term “highest” is applicable only when fiars are struck for more than one

quality of grain; hence there is dissatisfaction amongst the clergy where only one quality of grain is valued. At the present date applications have been presented in a number of counties to the Sheriff to have two qualities fixed where it is the practice to have only one valued. In some cases (in Inverness and in Forfar) this has been successful, but the tendency of the Courts is undoubtedly against any alteration on the existing practice, and there is a heavy *onus* on the petitioners to show cause for the proposed change. An excellent statement of the reasons against change is given by the Sheriff of Roxburgh in a note to his interlocutor refusing the prayer of the petition (Feb. 1897, 4 S. L. T. No. 418). No doubt the diversity of practice is objectionable, but legislation would seem to be necessary to attain uniformity. Another objection is that the flars prices are based on sales made during a part of the year only, and that when prices are probably not at the highest. In England, under the Tithe Commutation Acts, one set of values for the whole country is fixed by the Land Commissioners, and is based on an average of the preceding seven years.

[*Histor. Acc. of Flars*, a pamphlet by George Paterson (1851); *Flars Prices*, by W. Hector; *Position of Flars Prices; Conversion of Grain Payments*, Nenion Elliot; Ersk. i. 4. 6; Hunter, 2. 273; Connell on *Tithes*, l. 431; Barclay, *Digest*, s.v.]

**Fictio juris.**—Every system of law requires frequent modification, in order to carry out current ideas of what is equitable, and to adapt it to the changing needs of society. Historically, this process of advancement and amendment of the law has been largely effected by means of legal fictions. A fiction of law is an assumption, which is false in fact, made with the special purpose of bringing a case under a particular rule of law, or of excluding a case from such a rule. A fiction thus serves as a means of making new law, without the necessity of formulating new rules. It is, in short, a device whereby the substance of the law is altered, while the form of the law remains unaltered.

Fictions, as a means of effecting legal changes, were especially congenial to the Roman habit of mind. In their task of reforming and extending the law, the praetors proceeded as unobtrusively as possible: and, by employing a series of legal fictions, they to a large extent mitigated the strictness and rigour of the old law, while outwardly adhering to its requirements. The introduction of the formulary system opened the way to the free and efficient use of fictions in procedure. The word *fictio* itself is a technical term of procedure, signifying a statement inserted by the praetor in the *intentio* of the *formula*, instructing the *judex* to assume that a requirement of the *jus civile* is satisfied, although, as a matter of fact, the requirement in question is not satisfied. Where the *intentio* of the formula was thus modified by the insertion of a *fictio*, the action was an *actio fictitia*. By means of such *actiones fictitiae*, the protection enjoyed by quiritarian owners was extended to persons who held property by inheritance or purchase on a purely praetorian title, *ex edicto praetoris*. By similar means the legal redress provided for the citizen was in great part made available to the peregrine. Again, by the *jus civile, capitis diminutio* had the effect of extinguishing a debtor's *persona*, so that his debt ceased to exist; and in order to preserve the creditor's remedy for the debt, an *actio fictitia* was given him against the debtor, the fiction being that the latter had suffered no *capitis diminutio*. So a fiction might consist in an assumption of completed usucapio of citizenship, of delivery or non-delivery, of



alienation, and so on. In each case its effect was virtually to abrogate the old law, and substitute for it a new law.

The *fictio legis Corneliæ* is an instance of a *fictio* introduced by the Statute. It was necessary, in order to the validity of a testament, that the testator should be a *civis Romanus* at the moment of his death. Accordingly, if a citizen was taken captive by the enemy, and died in captivity, the testament which he had executed at home, before he was taken prisoner, was void. The difficulty was solved by the *fictio legis Corneliæ*, by which the testator was assumed to have died at the very moment of being taken prisoner. In the later Roman law the importance of fictions disappeared; and several of the older fictions, which still survived, were done away with by Justinian (*Cod.* 5. 12. 30; 6. 4. 4; 8. 54. 8).

Fictions are employed, not merely for the purpose of amending or extending the law, but also in order to make legal conceptions more intelligible. Thus it is by a legal fiction that the qualities of a person are assigned to a partnership or a corporation. So the doctrine of domicile is a pure legal creation—a person's rights being determined on the assumption of certain facts.

In the development of English law, legal fictions have played an important part. *In fictione juris semper æquitas existit* (Co. Lit. a). So, in constitutional law, as has been frequently pointed out, it is by means of a series of fictions that the British constitution is at once theoretically a despotism and practically a republic (see Dicey, *Law of Constitution*, chaps I. and II.). A legal fiction must, however, give place to the real facts where otherwise wrong would be done. "Wherever a fiction of law works injustice, and the facts, which by fiction are supposed to exist, are inconsistent with the real facts, a Court of law ought to look to the real facts" (per Bayley, J., in *Lyttleton*, 3 B. & C. 325; see also per Mansfield in *Johnson*, 2 Burr 963; cf. Whitaker, L. J., 21 C. P. 116). It was by a series of legal fictions that the Court of Queen's Bench in England acquired its extensive jurisdiction (Maine, *Anc. Law*, p. 26). So effectual is a legal fiction as a means of extending jurisdiction that Bentham defines it as a "wilful falsehood, having for its object the stealing legislative power by and for hands which could not, or durst not, openly claim it" (Bentham, *Works*, vol. v. p. 13).

In Scots law a recourse is seldom had to legal fictions: and those that exist are taken directly from the Roman law (Ersk. iv. 2. 38; Stair, II. 45. 15). As to legal fictions generally, see Maine, *Anc. Law*, chap. II.; Savigny, *Syst.* i. 295: Auston, 629–631.

**Fideicommissum**, in Roman law, was an informal bequest made by requesting (*verbis precativis*) an heir or legatee (*fiduciarius*) to make over certain property to the beneficiary (*fideicommissarius*). It was not till the time of Augustus that *fideicommissa* were legally binding. That emperor established an *extraordinaria cognitio* in favour of *fideicommissarii*, and subsequently a special *prætor fideicommissarius* was appointed with power to compel the *fiduciarius* to perform the trust in favour of the beneficiary. *Fideicommissa* were much used for the purpose of leaving property to *peregrini* and other persons who were totally or partially disabled from taking directly under a will. Such a trust might be charged on any person who took any benefit from the testator in the event of his death, whether as heir, or legatee, or donee *mortis causa*, or the *fideicommissarius* himself. A *fideicommissum* might be constituted

although the deceased left no will, in which case it was charged on the heir *ab intestato*. In general, *fideicommissa* were created by *codicilli* (q.v.). In the later law, the formal *legatum* and the informal *fideicommissum* came practically to produce precisely the same effects.—[Gaius ii. 246–289; *Inst.* ii. 23 and 24; *Ulp. Frag.* tit. 19; *Dig.* 30–33; *Cod.* vi. 37–54.]

**Fidejussio** was the contract of cautionry in the later Roman law. In the earlier law the forms of cautionry generally used were *sponsio* and *fidepromissio*; but *sponsores* and *fidepromissores* had been entirely supplanted by *fidejussores* before the time of Justinian. *Fidejussio*, like *sponsio* and *fidepromissio*, was entered into by a formal question and answer. The creditor asked: “*idem fide tua esse jubes?*” The cautioner replied: “*fide mea esse jubeo.*” *Sponsio* and *fidepromissio* could only be attached to an obligation contracted *verbis*, whereas *fidejussio* might be accessory to any obligation, whether contracted *re verbis litteris* or *consensu*, or even incurred *ex delicto*. *Omni obligationi fidejussor accedere potest* (*Dig.* 46. 1. 1). Again, the liability of a *sponsor* or *fidepromissor* did not pass to his heir, and was limited by Statute to two years, whereas the *fidejussor* bound his heir, and the action by which his liability was enforced was an *actio perpetua*.

Each *fidejussor* was liable for the whole debt as if he were sole debtor, his obligation being that of a *correus*. His correal liability was, however, accessory to that of the principal debtor. There must exist a principal obligation on the part of another person, either previously or contemporaneously or subsequently contracted (*Dig.* 46. 1. 16; *Inst.* 3. 21. 3); but it was enough if the principal debtor was bound by a natural obligation (*Dig.* 46. 1. 16, 3 and 4). A cautioner could recover from the principal debtor on a *mandati judicium* whatever he had been compelled to pay on his account.

In the later law the stringent liability of cautionry was somewhat relaxed by special enactments conferring certain privileges (*beneficia*) on cautioners. By a rescript of Hadrian, a cautioner, on being sued by the creditor, could demand (*ope exceptionis*) that the creditor should sue each of the other solvent cautioners for his proportion of the debt (see *BENEFICIUM DIVISIONIS*). Again, in virtue of the *beneficium cedendarum actionum*, a cautioner, on paying the principal debt, could demand from the creditor an assignation of all his rights of action against the principal debtor and the co-cautioners (see *BENEFICIUM CEDENDARUM ACTIONUM*). Finally, by Novel 4, Justinian gave a cautioner the right to demand that the creditor should first take measures to compel payment of the debt by the principal debtor (*BENEFICIUM ORDINIS*).

By the SC. Velleianum, passed in the reign of Claudius, A.D. 46, women were prohibited from becoming cautioners. If an action were brought against a woman in respect of a cautionary obligation, she could plead the *senatus consultum* as an *exceptio*.

*Fidejussio* was a species of *intercessio*, a term used to denote any assumption of liability for the debt of another by contract with his creditor. Other forms of *intercessio* recognised in the later law, and closely akin to *fidejussio*, were *constitutio debiti alieni*, and *mandatum qualificatum*.

[*Dig.* 46. 1; *Cod.* 8. 41; *Inst.* iii. 20.] See CAUTIONARY OBLIGATIONS.

**Filiation.**—See AFFILIATION.

**Final Judgment.**—A final judgment is one by which the whole cause is determined by the judge or Court before whom it depends (Mackay, *Pract.* i. 584; *Manual*, p. 309). In the Outer House a final judgment has been defined as a judgment “which, either by itself or taken along with a previous interlocutor or interlocutors, disposes of the whole subject-matter of the cause, or of the competition between the parties in a process of competition, although judgment shall not have been pronounced upon all the questions of law or fact raised in the cause” (31 & 32 Vict. c. 100, s. 53). After such a final judgment in the Outer House, it shall not in any case be necessary for the Inner House to remit the same back to the Outer House; “but the cause, when taken to the Inner House, after having been so decided in the Outer House, even though the interlocutor of the Lord Ordinary or any of the procedure shall be held to have been incompetent, shall, except in special circumstances rendering a remit expedient, remain in the Inner House until it shall be finally and completely decided in the Court of Session” (s. 56). It is further provided that it shall not prevent a cause from being held as finally decided in the Outer House that “expenses, if found due, have not been taxed, modified, or decerned for” (*Stirling Maxwell’s Trs.*, 1883, 11 R. 1; *Tennants*, 1881, 8 R. 824). Where, however, the judge, in decerning for expenses found due, acts not merely executorially, but applies his mind to a question not previously considered, this section does not apply. Thus, where an interlocutor decerned against the defender for a certain sum and found the pursuer entitled to expenses, “reserving till after taxation the question whether any, and if so what, modification shall be allowed . . .,” and where a subsequent interlocutor was issued to this effect: “Approves of the Auditor’s report on the pursuer’s account of expenses, and having heard counsel on the question of modification, modifies the same to the extent of . . .,” it was held that the first interlocutor was not final within the meaning of sec. 53, and that a reclaiming note against the second interlocutor was competent (*Crollin*, 1893, 21 R. 21; *Taylor’s Trs.*, 1896, 4 S. L. T. 15). Where there is no finding of expenses, an appeal is incompetent from the Sheriff Court (*Russell*, 1877, 4 R. 737).

Speaking generally, no motion can be made in a cause before a judge after a final judgment has been issued; a motion can, however, be made for the purpose of correcting errors in the interlocutor, and to refer the cause to the opponent’s oath (Mackay, *Manual*, p. 309, note (c)). A final judgment can always be brought under review of the superior Court without leave, unless review is excluded by Statute, whereas interlocutory decrees require the leave of the Court. A reclaiming note against a final interlocutor must be presented within twenty-one days (6 Geo. iv. c. 120, s. 18). The effect of a reclaiming note against a final judgment is to submit to the review of the Inner House all the prior interlocutors of the Lord Ordinary in the cause (31 & 32 Vict. c. 100, s. 52).—[Mackay, *Manual*, pp. 295, 309, 590; *Pract.* ii. p. 446; Coldstream, *Procedure*, pp. 234, 341; Dove Wilson, *S. C. Practice*, pp. 315, 573]. See RECLAIMING; APPEAL TO HOUSE OF LORDS; DECREE.

**Final Judgment (Sheriff Court).**—See APPEAL TO SHERIFF-PRINCIPAL FROM SHERIFF-SUBSTITUTE (*Appeal against a Final Judgment*), and APPEAL TO COURT OF SESSION FROM SHERIFF COURT (*Appeals for Review*: (c) *Interlocutors disposing of the whole merits of the cause*).



**Finance Acts, 1894 and 1896 (Appeal to Court of Session and to Sheriff Court).**—*COURT OF SESSION.*—By sec. 10 of 57 & 58 Vict. c. 30, Finance Act, 1894, any person aggrieved by the decision of the Commissioners under the Act, as regards (1) repayment of excess of duty, and (2) the amount of duty claimed by the Commissioners, may appeal to the Court of Session to determine the amount of duty, and what excess, if any, should be repaid.

Although payment of expenses is, in general, the condition of appeal, it may be dispensed with, on finding security, where the Court considers that payment would involve hardship (*ib.* subs. 4).

Appeal to the House of Lords from the Court of Session, except with the leave of the latter, is prohibited (*ib.* subs. 2).

*SHERIFF COURT.*—Appeal in the same circumstances and under the same conditions may be to the Sheriff Court where the value of the property in respect of which the dispute arises is, as alleged by the Commissioners, under £10,000: that is, where the duty does not exceed £300 (*ib.* subs. 5). Under this subsection it was necessary to have the leave of the Sheriff Court in order to appeal from it to the Court of Session, but the Finance Act of 1896, 59 & 60 Vict. c. 28, s. 22, would appear to do away with this necessity (see Lorimer, *New Death Duties* (Supplement), p. 22).

The special rules of procedure applicable to such appeals, whether to the Court of Session or to the Sheriff Court, are contained in the Act of Sederunt of 17 July 1895 (*q.v.*).

**Finance Committee.**—See COUNTY COUNCIL (VI. D).

**Findings (in Fact and in Law): Sheriff Court.**—In any judgment proceeding on proof, a Sheriff must pronounce findings in fact and in law. That is to say, he must distinctly specify the several facts material to the case which he finds to be established by the proof, and also the points of law which he proposes to decide; and he must express how far his judgment proceeds on the matter of fact so found, or on the matter of law (A. S. 15 Feb. 1851; *Mackay*, 1894, 21 R. 894; *Glasgow Gas Light Co.*, 1866, 4 M. 1041; in these cases it was remitted back to the Sheriff to pronounce an interlocutor in the form prescribed by the A. S.; as also in *Melrose*, 1868, 6 M. 952, where, in addition, it was held that the A. S. is not overruled by the 13th section of the Sheriff Court Act of 1853 (which requires the Sheriff to set forth in the interlocutor, or a note appended to it, the grounds on which he has proceeded), and that the parties were not entitled to waive the objection). The findings must be contained in the interlocutor itself, and not merely in the note appended (*McCaffie*, 1896, 33 S. L. R. 601). On the practical difficulty often met with in distinguishing between findings in fact and in law, see *Mackay*, 1881, 8 R. (H. L.) 37; *Shepherd*, 1881, 9 R. (H. L.) 1; *Caird*, 1887, 14 R. (H. L.) 37.

[Dove Wilson, *Practice*, p. 182.]

**Fine.**—A fine is a pecuniary penalty. In Scotland minor or trifling offences are usually punished by the exaction of a fine. In most of these cases the judge has at common law the power of inflicting a fine instead of, or in addition to, imprisonment (Macdonald, 17, note 1). Many Statutes

impose a pecuniary penalty. The judge may not, of course, impose a penalty in excess of that laid down by Statute. By sec. 6 of the Summary Jurisdiction (Scotland) Act, 1881 (44 & 45 Vict. c. 33), an extensive power of mitigating penalties has been conferred. The section is as follows:—

“In all proceedings under the Summary Jurisdiction Acts—

- (a) Where the punishment of imprisonment is imposed by Act of Parliament, the Court may, if it thinks the justice of the case demands it, substitute for imprisonment a fine not exceeding twenty-five pounds or reduce the amount of imprisonment, and notwithstanding any enactment to the contrary impose the same without hard labour, and when the punishment of a penalty or fine is imposed, it may reduce the amount of such fine, and when in the case either of imprisonment or a fine the respondent is required to come under his own obligation, or to find caution or security for keeping the peace and observing some other condition, or to do any of such things, the Court may dispense with any such requirement or any part thereof:

Provided that nothing in this Act shall authorise the Court to reduce the amount of a fine when the Act prescribing such amount carries into effect a treaty, convention, or agreement with a foreign State, and such treaty, convention, or agreement stipulates for a fine of minimum amount:

Provided further, that this section shall not apply to proceedings taken under any Act relating to any of Her Majesty's regular or auxiliary forces:

- (b) Where a warrant of imprisonment is granted, whether in default of payment of a penalty or expenses, or for failure to find caution or security, or in default of recovery of sufficient goods by pouncing and sale, when the amount adjudged to be paid, or for which security is to be found—

Does not exceed ten shillings . . . . .	The period of imprisonment shall not exceed seven days.
Exceeds ten shillings but does not exceed one pound . . . . .	Fourteen days.
Exceeds one pound but does not exceed five pounds . . . . .	One month.
Exceeds five pounds but does not exceed twenty pounds . . . . .	Two months.
Exceeds twenty pounds . . . . .	Three months :

- (c) Where any sum is adjudged to be paid, the Court may do any or all of the following things:—

- (1) Allow time for payment:
- (2) Direct payment to be made by instalments:
- (3) Require security or caution to be found for the payment of such sums or instalments at such time or times as the Court may prescribe:

Where a sum is directed to be paid by instalments and default is made in the payment of any one instalment, the same proceedings may be taken as if default had been made in payment of all the instalments then remaining unpaid.

The Court directing payment of a sum or of an instalment may direct the payment to be made at such times and places and to such person as the Court may specify, and every person to whom such sum or instalment

is paid, where not the Clerk of Court, shall as soon as may be pay over or account for the same to the Clerk, to be applied by him in manner provided by the special Act. In complaints not founded on any special Act the maximum sentence shall continue to be as defined by the first recited Act."

See PUNISHMENT; ARBITRARY PUNISHMENT.

**Finium regundorum actio** was one of the divisory actions of Roman law. It was competent between proprietors of adjoining lands, when the boundaries of the *confines agri* had become uncertain, or when one of the proprietors had, by wilful act, destroyed the boundary marks (*Inst.* iv. 17. 6). The *judex* in this action, as in the other divisory actions, had a large discretion in regulating the boundaries (*Dig.* 10. 1; *Cod.* 3. 39). The old Scotch action of molestation was in its main features identical with this Roman law action.—[*Stair*, i. 8. 28; iv. 27. 2; *Balf. Pract.* 434; *Ersk.* iv. 1. 48; cf. the Act 1661, c. 41.] See MARCHES; PERAMBULATION; MOLESTATION.

**Fire, Loss by.**—See CARRIER; INNKEEPER; NAUTLE, CAUPONES, STABULARII.

**Firearms (Reckless or culpable use of).**—The discharge of firearms, whether the result be to injure anyone or not, is an offence, if the circumstances are such that blame is reasonably to be imputed to the person who has discharged the weapon. If the firearm has been fired at anyone wilfully, the person who has fired it may be charged with a contravention of the Act 10 Geo. iv. c. 38, with aggravated assault, or with culpable and reckless use of firearms. But it is not necessary that the weapon should be aimed at anyone, or that there should be intent to injure anyone. If the act is done with a reckless disregard of consequences, or even if the discharge is merely calculated to disturb the minds of the lieges, the person who fires is liable to criminal proceedings. Thus firing into a house to intimidate the residents, or in wanton recklessness, are offences, although no one was in the room fired into (*Macdonald, Crim. Law*, p. 194). If anyone, unknown to the accused, was in the room, and was injured, this would be an aggravation (*ib.*). But obviously there are many cases where a relevant charge is or may be made, where there is no intention to injure or alarm, but merely thoughtlessness. Thus a sportsman who fires at a bird without paying attention to people being at work in the line of fire within a dangerous distance, is liable to prosecution; and an indictment would probably lie against the man who peppers another in a grouse path, the *locus* of which has been pointed out to him, or hits his neighbour who has kept his place in line in turnips.

The punishment may be penal servitude, and is generally imprisonment or a fine.

Under the Turnpike Act of 1831 (1 & 2 Will. iv. c. 43, s. 96), discharging any gun, pistol, or other firearms on any turnpike road, or on the side or sides thereof, or in any exposed situation near thereto, to the annoyance of any passenger or passengers, is an offence for which the offender is liable to a fine not exceeding 50s. over and above any damage occasioned.



**Fire Insurance.**—The subject of this article is dealt with under the following divisions:—I. General Principles (pp. 332–336); II. Constitution of the Contract (pp. 336–339); III. Representations and Warranties—Alterations (pp. 339–342); IV. The Risk (pp. 342–345); V. The Adjustment of the Loss (pp. 346–348).

#### I. GENERAL PRINCIPLES.

*Indemnity.*—Fire Insurance is a contract of indemnity by which the insurer undertakes, upon the terms and conditions in the policy, to indemnify the insured for loss or damage by fire. To sustain a loss the insured must have an interest in the property destroyed, and the value of that interest at the time of the loss is the measure of the amount which can legally be secured by a fire policy (*Castellain*, 1883, L. R. 11 Q. B. D. 380, 386; *Glasgow Prov. Invest. Soc.*, 1887, 14 R. 947, 965; *Simpson*, 1877, L. R. 3 App. Ca. 279, 284).

*Insurable Interest.*—It is not every interest in property which the law recognises as insurable. An expectation of benefit or advantage from the preservation of property, although it amounts to a moral certainty, does not itself give an insurable interest, unless it is coupled with a legal right. Thus, an heir, unless under an entail, has no insurable interest, although he may be heir-at-law to an ancestor incapable of making a will; and, generally, an interest which is contingent, and not founded upon an existing right under contract or otherwise, is not insurable (*Lucena*, 1806, 2 Bos. & P. N. R. 269; *Chambre, J.*, p. 299; *Lawrence, J.*, p. 306; *Lord Eldon*, p. 324; *Stockdale*, 1840, 6 M. & W. 224). On the other hand, the mere fact that an interest, vested in the insured at the time of the loss, is defeasible or arises from a contract subject to a resolutive condition, does not affect the validity of the insurance (*Columbian Ins. Co.*, 1829, 2 Peters, U.S. 25, 8 Curtis, 10).

Within the limits specified it will be seen that, in addition to the right of property in a subject, any right incidental to ownership, such as a right to rents, or profits, or any subsidiary right arising from contract, will constitute an insurable interest. Although rents or business profits during non-occupancy, while the premises injured by fire are under repair, may be insured by a policy expressly including them, they are not covered by a policy in general terms on the premises (*Menzies*, 1847, 9 D. 694; following *Wright*, 1834, 1 A. & E. 621).

Where there are separate interests in the same subjects, each party may insure independently of the others, and the presumption is that his insurance is for his own benefit alone. Thus a vendee has no claim upon the proceeds of a policy effected by the vendor before the loss (*Rayner*, 1881, L. R. 14 Ch. D. 297, 18 Ch. D. 1), or a mortgagee upon the policy effected by the mortgagor, although the latter is under covenant to insure (*Lees*, 1866, L. R. 2 Eq. 143), or a lessee in the lessor's insurance (*Leeds*, 1827, 1 Sim. 146). The same rule holds in the case of liferenter and fiar (*Warwick*, 1882, L. R. 23 Ch. D. 188; *Pollock*, 1889, 26 S. L. R. 515), and in the case of prior and postponed bondholders (*Scottish Heritable Securities Assoc.*, 1883, 11 R. 287; *Godin*, 1758, 1 Burr. 490). If the lessee is under covenant to repair, and is thus liable to restore premises destroyed by accidental fire, the lessor is still entitled to effect insurance on his own account to cover the double contingency of a loss by fire and of the lessee's insolvency (*Andrews*, 1886, 18 L. R. Ir. 355).

If a transfer under a contract of sale is complete, the vendor's policy comes to an end, and the vendee acquires the interest: but if the property

has not passed to the vendee, and if the subject is not at his risk, a mere expectation of profit to arise from the subsequent performance of the contract is not covered by a policy on the goods (*Anderson*, 1876, L. R. 10 C. P. 58, 609, 1 App. Ca. 713, 723). But if the risk has passed, although the property may still be in the vendor, the vendee has an interest (*Martineau*, 1872, L. R. 7 Q. B. 436).

If the vendor retains under the contract a right of retention or a lien for the purchase money unpaid, an insurance effected before the transfer is still available to this extent, subject to the equitable assignment to his insurer of the vendor's personal claim against the vendee (*Rayner, supra*; see post, p. 334).

In the case of the sale of a heritable subject, the contract of sale, by missives or otherwise, usually precedes the conveyance of the subjects, and the entry to possession by the vendee; and in England it is settled that if, in the interval, the subject is damaged by fire, the vendee is not entitled to any abatement from the price (*Rayner, supra*; *Paine*, 1801, 6 Ves. 349); and the rule adopted in practice in Scotland (where the point has not been expressly decided), is to obtain a transfer of the policy to the purchaser upon the completion of the missives on the footing that the property is then at his risk.

An insurable interest may in certain circumstances be acquired in a fiduciary character. Thus a trustee who holds the legal title to the property has an insurable interest, and may insure in his own name for the beneficiaries (*Lucena, supra*, per Lord Eldon, 2 Bos. & P. N. R. 324; *Elsworth*, 1873, L. R. 8 C. P. 596, per Brett, J., 638); and in certain other cases an insurance by one of the parties interested in his own name has been held to be for the joint benefit where, first, this was the intention in effecting the policy, and, second, where the terms of the policy were such as to cover the joint interest, or where the insurers voluntarily paid the whole damage (*Irvine*, 1831, 2 B. & Ad. 193, 196; *Gillespie*, 1874, 1 R. 423, 433; *Castellain*, 1883, L. R. 11 Q. B. D. 380, 398). Thus where the policy covers "goods held in trust or on commission" by a bailee, it has been decided that the insured may recover, as trustee for the owners, the value of goods intrusted to him for carriage, custody, or otherwise, which may have been destroyed by fire (*Waters*, 1856, 5 El. & Bl. 870; *London & N.-W. Rly. Co.*, 1859, 1 El. & El. 652). When the policy is issued in the above terms the bailee is entitled to apply the sum recovered to the satisfaction, in the first instance, of his own loss, including his loss of charges or commission on customers' goods, holding the residue merely, if any, as trustee for his customers (*Dalglish*, 1854, 16 D. 332). This form of policy is now rarely issued, and only to persons who are actual custodians of the goods. Such a policy is now usually expressed to be upon "goods the insured's own, or held in trust or on commission, for which he is responsible." The insurance is in this case a reinsurance of the carrier's or warehouseman's liability at common law, or under his contract of carriage or bailment. The words "for which he is responsible" are held to govern the whole clause, and to confine the insurance to goods for the safety of which the bailee is legally liable (*North British & Mercantile Ins. Co.*, 1871, L. R. 7 C. P. 25).

*Assignability.*—A policy of fire insurance issued to a person named cannot be assigned upon a transfer of the property without the insurer's consent (*Lynch*, 1729, 4 Bro. P. C. 431; *Sadler's Company*, 1743, 2 Atk. 554). In the case of marine policies the clause which extends the insurance to "all to whom the property does or may appertain in part or in all," has, by mercantile usage, the effect of making the policy assignable: but in the case of fire policies there is no such clause, and the scope of the insurance

is therefore limited to the interest of the persons named (Arnould on *Marine Ins.*, 6th ed., pp. 107, 234).

*Subrogation*.—The position of an insurer is not that of a cautioner; his liability is a primary, not a secondary, liability. An insurer is accordingly not entitled to require the insured to exhaust his remedies against third parties liable for the loss before making a claim upon his policy. Thus, if a mortgagee insures independently of the mortgagor, and the security is destroyed, he is entitled to be indemnified for this loss up to the amount of his debt by his insurers, and is not bound first to enforce his debtor's personal obligation (*Collingridge*, 1877, L. R. 3 Q. B. D. 173; *Dickenson*, 1868, L. R. 3 C. P. 639). The primary liability thus imposed upon an insurer is subject to his right of subrogation, in virtue of which, and as a corollary from the principle of indemnity, the insurer, who pays as for a total loss, is entitled to the benefit of all the means open to the insured by which that loss may be diminished (*Castellain*, 1883, L. R. 11 Q. B. D. 380; *Darrell*, 1880, L. R. 5 Q. B. D. 560; *Burnund*, 1882, L. R. 7 App. Ca. 333, 339). The principle applies in all cases where a third party is liable to make good the loss as well as the insurer; and it is immaterial whether the liability of such third party arises from contract, or rests upon delict or negligence (*Quebec Fire Assurance Co.*, 1851, 7 Moo. P. C. 286, 316; *Mason*, 1782, 3 Doug. 61; *Clark*, 1823, 2 B. & C. 254).

There are, however, certain limitations upon the right of subrogation. For instance, while the insured is not entitled, after a loss has occurred, to release his claims against third parties gratuitously, and so defeat the insurer's claim to an assignment (*Commercial Union*, 1874, 43 L. J. Ch. 601, L. R. 9 Ch. App. 483; *West of England Fire Insur. Co.*, 1897, L. R. 1 Q. B. 226), there is no restraint upon freedom of contract before the loss; and the insured may enter into contracts in regard to the subject insured which may cut off the insurer's right of subrogation. Thus if, before the loss, a seller agrees with the purchaser to deduct from the price any sum he may recover under an existing policy, the insurers will have no right of subrogation (*Nichols & Co.*, 1886, 14 R. App. 1094; *Nelson*, 1887, 3 Am. St. Reps. 308). In other words, the insurer's right to enforce relief against third parties is commensurate with that of the insured. In the case supposed, the purchaser might plead the agreement against an action for the price by the insured, and he is therefore entitled to plead it against the insurers, who sue as assignees merely of the insured (see also *Simpson*, 1877, L. R. 3 App. Ca. 279). Nor is the insured in general bound, in effecting an insurance, to disclose the existence of agreements with third parties which affect the insurer's right of recourse, unless they are made the subject of special inquiry, or where the insured is otherwise made aware that the premium is calculated upon the hypothesis that the insurer will be entitled to an assignment on payment (*Tide*, 1885, L. R. 15 Q. B. D. 368, 375; *Phoenix Co.*, 1885, 117 U.S. 312, 326). A second limitation to the right of subrogation arises when the purchaser, or other third party primarily liable for the loss, is insolvent. The insurer's right of recourse is then of no value; but this fact does not constitute a valid defence to an action by the insured upon the policy (*Andrews*, 1886, 18 L. R. Ir. 355).

*Contribution—Several Insurances*.—The doctrine of contribution is also a corollary from the principle of indemnity. The right to contribution, although usually provided for by a condition of the policy, exists apart from special stipulation, wherever there are two or more insurances covering the same interest in the same property, the aggregate amount insured being greater than the loss by fire. The insurers then contribute



ratably to the loss in the proportion of the total sums insured by the different policies. The doctrine of contribution is not applicable unless the same interest is covered by the two policies. If separate interests in the same subject are insured, the insurers, as regards their liability *inter se*, stand in the place of the parties they have insured, so that if one of the parties is primarily liable for the loss in a question with the other, his insurer must make good the whole loss. Thus, if a carrier or warehouseman, primarily liable for the safety of goods in his custody, insures to cover this risk by a policy on goods "for which he is responsible," and the owner also insures, there is no double insurance, and no contribution. The interests covered by the one policy depend on a risk or liability for the safety of the goods, arising either at common law or under contract. In the case of the owner the interest is the ordinary interest arising from ownership, which is not affected by the fact that the owner may have other remedies by which to make good a loss besides that afforded by his policy (*North British & Mercantile Ins. Co.*, 1876, L. R. 5 Ch. D. 569). This decision was followed in the case of separate insurances by prior and postponed bondholders (*Scottish Amicable Heritable Securities Assoc.*, 1883, 11 R. 287; see also *Godin*, 1758, 1 Burr. 490), and in the case of separate insurances by lessor and lessee (*Andrews*, 1886, 18 L. R. Ir. 355). In neither of these cases was the interest covered by the two policies the same, and accordingly the Court held there was no room for the application of the principle of contribution. On the other hand, as has been pointed out above, a bailee's policy may be effected in such terms as to cover the interest of the owner of the goods in his custody, and not merely the bailee's interest or responsibility; and where this is the case, and if the owner also insures, there will be double insurance as regards the owner's interest, and the insurers will contribute ratably to his indemnification (*Home Ins. Co.*, 1876, 93 U.S. 527). Again, contribution will be applicable if both lessor and lessee are insured, and if one of the policies is, in terms of a covenant to insure in the lease or otherwise, effected for the joint benefit (see *Reynard*, 1875, L. R. 10 Ch. 386); and similarly in the case of mortgagor and mortgagee, if the mortgagor's policy is effected by arrangement with the mortgagee to cover the joint interest (*Nichols*, 1886, 14 R. App. 1094; see also *Garden*, 1852, 23 L. J. Ch. 478). Thus contribution may be pleaded by the insurers under one policy, when another policy, although not in the name of the party to the first, covers his interest along with that of others, but not in the case where, although upon the same subjects, the second policy is exclusively intended, or only, by its terms, available for the party in whose name it is issued.

Although contribution is not pleadable where prior and postponed bondholders independently insure the security, payment under one policy may yet indirectly effect liability under the others. Thus, on the principle of indemnity, it would be a defence to a claim by postponed bondholders against their insurers, that by payments of insurance money to prior bondholders the preferable debt upon the security had been reduced to the same extent as the value of the security had been diminished by the fire. In the case of *The Westminster Fire Office* (1888, 14 R. 947, 15 R. H. L. 89, L. R. 13 App. Ca. 699) this defence was maintained by the insurers of the postponed bondholders, and it is thought that its validity could not have been questioned had the Court been prepared to accept as the measure of the damage by fire the amount required to reinstate the subjects. The amount required to reinstate had been paid by different insurers to the prior bondholders, who had applied it in reduction of their debt, and the pre-

mises were not reinstated. It further appeared from the admissions and the proof in the case that, taking into account the reduction in the debt effected by the payment to the prior bondholders, the salvage of the subjects, estimated at their market value, did not cover the postponed bonds and the balance of prior bonds, whereas before the fire the value was sufficient to cover all the bonds. The question in the case really became what method of estimating a fire loss was to be adopted; and the decision was that, in dealing with such interests, the proper method was to estimate the loss, not by the amount required to reinstate, but by the difference in saleable value of the subjects before and after the fire (see *post*, V.). In this view the rule above referred to formed no bar to the recovery of the sum claimed by the postponed bondholders (as loss to the security itself), since, when added to that already paid to the prior bondholders, the aggregate did not exceed the loss by fire. The final result of the case would seem to be to establish the following propositions:—(1) That a mortgagee or other encumbrancer has an insurable interest in the security notwithstanding the existence of prior encumbrances, provided the aggregate amount of the encumbrances is not greater than the value of the security; (2) a subsequent encumbrancer insuring his interest will have a right to recover in the event of a loss where the security is so reduced in value as to leave his debt wholly or partly uncovered after the prior bonds have been paid off, either by insurance or out of the salvage; (3) in estimating this reduced value for the purpose of such an insurance, the market value of the site and salvage of buildings is to be taken, and not the value for the purposes of reinstatement, which is in general much greater; (4) insurance by creditors of their independent interests is not to be treated as double insurance by the owner, in respect that he is made a party to each of the creditors' policies for his reversionary interest.

## II. CONSTITUTION OF THE CONTRACT.

*Proposal and Acceptance.*—A contract of insurance against fire may be constituted by writing or by parole (*Christie*, 1825, 3 Shaw, 519; *Relief Fire Ins. Co.*, 1876, 94 U.S. 574). There is no statutory provision, as in marine insurance, requiring the contract to be embodied in a stamped policy, although a penalty is imposed upon any person who receives a premium for an insurance against fire, and who does not within a specified period thereafter issue a policy duly stamped. The stamp is 1d., and there is no provision against after-stamping (Stamp Act, 1891, 54 & 55 Vict. c. 39, s. 100: *Thomson*, 1889, L. R. 23 Q. B. D. 361). But in order to constitute a valid insurance, whether by parole or by informal writings, the essential elements of the contract—the subject insured, the risk, and the premium—must be determined (*Strohn*, 1875, 19 Am. Rep. 777). Thus, if a proposal is accepted on the understanding that the premium is to be the same as that charged by another company upon the risk, there is no insurance till the premium has been fixed by that company (*Christie, supra*). Where a proposal is accepted by a company upon the condition that the insurance shall not begin until the premium is paid, they are not bound to issue a policy or make good a loss, if before the premium is tendered the risk has terminated or has materially altered (*Sickness and Accident Assurance Association*, 1892, 19 R. 977; *Cunning*, 1886, L. R. 16 Q. B. D. 727). In general, when the policy or other writing embodying the contract has not been delivered, the onus is upon the party alleging a contract of insurance to show that the premium has been paid, or that credit has been given for it (*McElroy*, 1897, 34 S. L. R.

247). Credit is held to have been given for the premium when the policy or an interim receipt is issued to the insured without requiring payment (*Kelly*, 1883, 1 C. & E. 47); and in a case in the Supreme Court of the United States it was held, in view of the practice of the company, that a proposal and acceptance by correspondence constituted a completed contract, although the premium was not paid before the loss (*Eames*, 1876, 94 U.S. 621). An offer by a company to insure on specified terms cannot be revoked after the applicant has posted an acceptance of the offer (*Taylor*, 1849, U.S., 9 Howard, 390, 18 Curtis, 191; *Henthorn*, L. R. 1892, 2 Ch. 27).

*Covering Notes.*—Where an application is made for insurance, it is the practice of most companies to issue interim covering notes, by which the property is protected until the company have determined whether to accept or decline the risk. The covering note sets forth the heads of the proposed insurance, and is made subject to the usual terms and conditions of the company's policies applicable to the class of risk. It acknowledges receipt of the premium, or of a deposit on account of premium where the rate is not finally fixed, and declares the subjects insured until the policy is delivered, or notice given that the proposal is declined. The period of endurance of the covering note is usually limited to a month, and it is provided that on the termination of the insurance by the expiry of this period, or by refusal notified to the insured, the part of the premium unearned shall be returned. A covering note thus corresponds to a "slip" in marine insurance, except that there is no statutory provision which prevents the former from operating as a valid contract. Thus a slip for fire insurance undertaken by Lloyds is valid (*Thomson*, 1889, L. R. 23 Q. B. D. 361; see also *Bhugwandus*, 1888, L. R. 14 App. Ca. 83). When the usual conditions of the company's policies are incorporated by reference into the interim note, it will be invalidated by a breach on the part of the insured of one of these conditions, although he may not have been aware of the condition in question (*Queen's Ins. Co. of Canada*, 1881, L. R. 7 App. Ca. 96, 122). On the other hand, it has been held in favour of the insured, that even in the absence of express provision, an interim agreement for insurance is to be construed with reference to the proved usage of the company, and as entitling the insured to a policy in the common form issued by the company (*Browning*, 1873, L. R. 5 P. C. 263, 273; *De Grove*, 1875, 19 Amer. Rep. 305).

An insurance entered into with an agent of a company is only valid when it is proved that the agent was authorised to bind the company (*McElroy*, 1897, 34 S. L. R. 247). Such authority may either be proved as expressly contained in the agent's instructions, or as inferred from a course of practice acquiesced in by the company. If such a course of practice is proved, it is immaterial what were the private instructions issued to the agent: it is sufficient if his act fell within the apparent scope of his authority (*Montreal Ins. Co.*, 1859, 13 Moo. P. C. 87, pp. 119-124). It is not the practice for British companies to authorise their agents to issue policies or conclude a final contract of insurance (*Linford*, 1864, 34 Beav. 291); but in some cases instructions to local agents authorise them to conclude interim insurances. In this case an interim note granted by the agent will bind the company till it is repudiated by them or by the insured (*Mackie*, 1869, 21 L. T. N. S. 102). When an agent is authorised to effect insurances on behalf of the company, he must, in order to bind the company, do so in the way prescribed in his instructions, unless a contrary practice acquiesced in by the company is proved. Thus an agent who is authorised to conclude contracts on behalf of the company in writing, and subject to the premium being paid, is not entitled to conclude contracts by parole, or to give credit



for the premium, and if he does so, will not bind the company (*Montreal Ins. Co., supra*); but if no method of payment is prescribed, an agent may accept a cheque in payment of the premium, there being funds in bank to meet it. The payment then dates from the receipt of the cheque (*Tayloe, 1849, U.S., 9 Howard, 390, 18 Curtis, 191*).

*Policy.*—The policy is the usual and proper form in which a contract of insurance is expressed. The following is the general form of policy now adopted by British companies for ordinary risks:—

Whereas *A. B.* (hereinafter called the insured) having paid to the *X. Y. Company* (hereinafter called the company) the sum of £ , being the premium for insuring against loss or damage by fire, the property hereinafter described in the several sums following, viz.:—(*Here follows the description of the various items insured, and the sums appropriated to each item*), the company hereby agrees with the insured (but subject to the conditions on the back hereof, which are to be taken as part of this policy) that if the property above described or any part thereof shall be destroyed or damaged by fire between the day of 18 , and the day of 18 , both inclusive, or at any time afterwards so long as the insured, or his representatives in interest, shall pay to the company, and it shall accept the sum required for the renewal of this policy on or before the day of in each succeeding year, the company will out of its Capital, Stock and Funds pay or make good all such loss or damage to an amount not exceeding in respect of the several matters above specified the sum set opposite thereto respectively and not exceeding in the whole the sum of £ .—In witness whereof, this policy has been signed on the day of 18 .

The conditions upon the back of the policy vary slightly in the case of different offices. The more important deal with the questions of misrepresentation, excepted risks, and adjustment of the loss, including contribution, and are noticed under these heads. The policy is to be construed with reference to the principle of indemnity, and it is thus not the damage or loss to the property described that the insurers undertake to make good, but the loss or damage to the interest of the insured in the property; and the same rule applies to the construction of the contribution clause (*supra, Andrews, 1886, 18 L. R. Ir. 355, per Pallas, C. B.*). Again, it is a rule of construction, that if the conditions are ambiguous and admit of interpretation they are to be read in the sense most favourable to the insured, the instrument being prepared by the company (*Fowkes, 1863, 3 B. & S. 917, 925; National Bank, 1877, 95 U.S. 673*).

Policies are usually for a year, and the terminal days are included in the period. This rule, which is expressed in the form of policy given above, was held to apply where the insurance was "from the 14th day of February 1868 until the 14th day of August 1868," and it was held that the company were liable for a loss which occurred upon the 14th August (*Isaacs, 1870, L. R. 5 Exch. 296; South Staffordshire Tramways Co., 1890, L. R. 1 Q. B. 402*).

In some cases fifteen days of grace are allowed for payment of the premium, but apart from express provision this does not mean that the insurance extends for that period. The insured cannot recover for a loss within the fifteen days unless the renewal premium has been paid before the loss, and he thus derives no benefit from the concession (*Tarleton, 1794, 5 T. R. 695; but see Salvin, 1805, 6 East, 571*). When the policy is renewed, the insured should communicate to the company any change in the structure or use of the subjects affecting the risk, or apply for a reinspection of the premises and a revision of the description in the policy, otherwise the policy may be challenged on the ground of concealment or misrepresentation of material facts. The rule seems to follow from the consideration that both parties, having an option to renew, are in substantially the same position as if they were entering into a new contract.

The condition in the policy, that the company will pay the loss "out of its Capital, Stock and Funds," excludes personal liability on the part of the members or shareholders of the company. If the funds prove insufficient, the insured has no recourse against the shareholders (*Lethbridge*, 1872, L. R. 13 Eq. 547).

Where a policy acknowledging receipt of the premium is prepared in terms of a proposal for insurance, and bears to be "signed, sealed, and delivered," it is complete and binding against the insurers although it remains in their possession, and although the premium has not been paid (*Venos*, 1867, L. R. 2 H. L. 296).

### III. REPRESENTATIONS AND WARRANTIES.

*Materiality.*—A contract of insurance is made upon the implied condition that all material facts have been disclosed. If there has been any misrepresentation or concealment of material facts known to either of the parties, although without fraudulent intention, the policy is voidable at the instance of the other. The criterion of materiality, which is equally applicable to all kinds of insurance, is whether the fact is one which would usually be regarded in the business of insurance as material. The proper question is whether the risk would have been accepted at all, or would have been accepted on the terms offered, if the truth had been known, taking as a standard the ordinary principles and methods of insurers in estimating the risk (*Ionides*, 1874, L. R. 9 Q. B. 531, per Blackburn, J., 537; *Lindeman*, 1828, 8 B. & C. 586, per Bayley, J., 592; *Moen*, 1842, 10 M. & W. 147, per Lord Abinger, 155; *Dalglish*, 1850, 2 M.N. & G. 231, per Baron Rolfe, 243).

Thus a representation as to the terms upon which other insurers have undertaken the risk proposed is material (*Sibbald*, 1814, 2 Dow's App. 263; *London Assur. Co.*, 1879, L. R. 11 Ch. D. 363); as also an over-valuation of the subject insured if it is excessive (*Ionides*, *supra*). It is not, in general, incumbent on the insured to state the nature of his interest in the property insured (*Crowley*, 1832, 3 B. & Ad. 478). It is not, in general, deemed a material fact that the insured has, prior to effecting the policy, entered into contracts with third parties which may deprive his insurer of a right of recourse in the event of a loss: but where the insured is made aware that a different rate of premium is charged according as the right of subrogation is kept open for the insurer or not, a special duty of disclosing such contracts will arise (*Tate*, 1885, 15 Q. B. D. 368; *Phœnix Co.*, 1885, 117 U.S. 312, 326; see *ante*, p. 334).

In *Bufe* (1815, 6 Taunt. 338) an insurance was effected on a warehouse in Heligoland in terms of a letter of instructions to the owner's London agents on 11th July. On the same date a fire had occurred in a boat-builder's yard, separated from the warehouse proposed for insurance by one other building only. This fire was apparently extinguished before the letter ordering the insurance was despatched, but two days later fire again broke out in the boat-builder's workshops, and spread to the premises covered by the policy, which had in the meantime been issued. The insured was exonerated of all intention of fraud, but it was held that the fact that a fire had occurred in the neighbouring workshop ought to have been communicated when the instructions for insurance were given, and that the failure to do so vitiated the policy.

A representation refers to the period when the contract is completed: and if, between the date of the proposal for insurance and the issue of the policy, any change of circumstance occurs, this must be communicated (*Sillem*, 1854,

3 El. & Bl. 868, 881; *Trail*, 1864, 4 Giff. 485; affd. 33 L. J. Ch. 521; *London Assurance Co.*, 1879, L. R. 11 Ch. D. 363).

A representation must have reference to an existing state of facts; a representation as to the future is a mere expression of intention, and has no binding force, unless incorporated as a condition of the contract (*Anson, Law of Contract*, 8th ed., 168). The onus is upon the insurers to prove a misrepresentation (*Davis*, 1891, L. R. A. C. 485).

*Warranties.*—The parties to a policy of insurance may agree that certain facts as to which information is asked shall be deemed material. This is the effect of a provision that the statements of the insured shall be warranties, or shall be part of the contract, or shall be the basis of the contract. In any of these cases the accuracy of the statements is a condition precedent to the right to recover upon the policy, and the question whether they are material is entirely excluded (*Newcastle Fire Insur. Co.*, 1815, 3 Dow's App. 255; *Anderson*, 1853, 4 H. of L. 484; *Thomson*, 1884, L. R. 9 App. Cas. 671). Thus, if the introduction of a steam-engine into the premises insured is expressly prohibited, the use of a steam-engine, for however short a period, and merely for the purpose of trial, will avoid the policy (*Glen*, 1853, 8 Exch. 607).

*Extent of Duty of Disclosure.*—The duty of disclosure is subject to certain limitations. Thus the insured is not bound to disclose (1) what the insurer knows or ought to know as part of his business, or (2) what the insurer takes upon himself the knowledge of, or (3) what he has waived information of, or (4) what is covered by a warranty (*Carter*, 1766, 3 Burr. 1905, per Lord Mansfield, 1910).

Under the first of these exceptions it is a sufficient answer to a defence of concealment or misrepresentation, or even of a breach of warranty, that the insurer or his agent knew the true state of the facts when the policy was entered into (*Newcastle Fire Ins. Co.*, *supra*, per Lord Eldon, pp. 262, 263; *Cruikshank*, 1895, 23 R. 147; *Barden*, 1892, L. R. 2 Q. B. 534). But it is not sufficient that the insurer might have inferred the fact from what he was told, or that at one time he was aware of the fact, if he was actually in ignorance of it when he entered into the policy (*Bates*, 1867, L. R. 2 Q. B. 595). It would seem to fall within the principle of these cases, and of those cited below in marine insurance, that the insured need only name the goods he keeps on his premises, and the operations carried on; he is under no obligation, in the case of well-known goods and processes, to inform the insurers whether they are hazardous or not (see *Noble*, 1780, 2 Doug. 510; *Harrower*, 1869, L. R. 4 Q. B. 523, 536, per Lush, J.; *Gandy*, 1871, L. R. 6 Q. B. 746).

Under the second exception, it has been held that if an agent of the company, empowered to negotiate fire risks, inspects the buildings on which insurance is desired, and furnishes a description to the head office, the insured will not be responsible for the accuracy of the description (*In re Universal Non-Tariff Fire Ins. Co. (Forbes & Co.'s Claim)*, 1875, L. R. 19 Eq. 485, 497); and if the agent himself values the property insured, the policy cannot afterwards be challenged on the ground of over-valuation.

As regards the third exception, it has been held that where the insurers accept a proposal containing specific questions, to some of which the insured has given no reply, the insurers must be held to have waived information as regards the answers omitted (*Phoenix Life Ins. Co.*, 1887, 120 U.S. 183; but see *London Assur. Co.*, 1879, L. R. 11 Ch. D. 363, per Jessel, M. R.). The fact that no specific question is asked does not, however, imply a waiver by an insurance company of information on any particular point in regard to



which the insured may have information, and which is material to the risk. *Buſe* (1815, 6 Taunt. 338) is an illustration of a circumstance which would not probably be made the subject of specific inquiry, but which it would be the duty of the applicant for insurance to disclose. In most proposal forms, in addition to the specific inquiries, there is usually a general question requiring the applicant to disclose any special circumstances material to the risk, and not included in the specific queries.

*Description of Subject.*—The description of the subject insured in a policy of fire insurance is of importance (1) for the purpose of identification, and (2) as determining and defining the risk. The description may be expressly made a warranty; and if this is done, any inaccuracy in the description, whether material to the risk or not, vitiates the policy (*Newcastle Fire Ins. Co.*, 1815, 3 Dow's App. 255); but in general the description, so far as it relates to the risk, is to be regarded as a representation merely, and not as a warranty, and in order to avoid the policy on the ground of its inaccuracy it must be shown that the misdescription is material. Thus if the subject insured, although not described with entire accuracy in the policy, would have fallen within the same class as regards premium, the misdescription will not avoid the policy (*Dobson*, 1827, 1 Moo. & M. 90; *Farmers' Ins. Co.*, 1836, 30 Am. Dec. 118).

*Alterations.*—Any alteration in the subject insured, after the policy has been effected, and during its currency, which changes its identity, so that the subject described in the policy no longer exists, will clearly have the effect of bringing the contract to an end. But an alteration which does not render the description in the policy inapplicable will not avoid it on this ground (*Bacendale*, 1859, 4 H. & N. 445, per Bramwell, B.). Within this limit it is not very clear what structural alterations or changes in the use of the subject insured are permissible. The description of the subject insured, both as regards its structure and use, must be substantially accurate when the policy is effected, but such description is not in general a warranty, but merely a representation, and as such does not apply to the future. Thus when there is no provision as to alterations, and no warranty as to use, it has been laid down that a change of use, although increasing the risk, does not avoid the policy if the insured has acted in good faith (*Pim*, 1843, 6 M. & G. 1). On the other hand, in *Sillem* (1854, 3 El. & Bl. 868, 882) the opinion was expressed that a material alteration in the structure or use of the premises after the policy is effected, whereby the risk is increased, will avoid the policy.

The execution of ordinary repairs upon the subject insured, even if extensive in character, has been held permissible in America in the absence of any provision against alterations (*Jolly*, 1827, 18 Am. Dec. 288), and, apart from special provision, a use or alteration which does not increase the risk does not vitiate the policy (*Curry*, 1830, 20 Am. Dec. 547).

Most policies, however, contain provisions dealing with alterations, or warranties as to the use of the premises, and the question is one of their proper construction. They are always interpreted so as to give the fullest liberty, compatible with their terms, to the insured. Thus in a policy on buildings, "where no fire is kept and no hazardous goods are deposited," containing a proviso "that if buildings of any description insured with the company shall be made use of to store or warehouse any hazardous goods," the policy should be void, these words must be understood of the habitual use of fire and deposit of goods. When, therefore, the loss happened in consequence of making a fire and bringing a tar barrel on to the premises for the purpose of repairing the roof, it was held that

the insured was entitled to recover (*Dobson*, 1827, 1 Moo. & M. 90). Again, in *Shaw* (1837, 6 A. & E. 75), where the provision was against any alteration in the buildings, or in the business carried on in them, and the insurance was upon "a kiln for drying corn in use," it was held that the use of the kiln upon one occasion only for drying bark (a more dangerous operation than that of drying corn) did not amount to a change in the business carried on, and did not avoid the policy, although the premises were burned down during the drying of the bark. In *Stokes* (1856, 1 H. & N. 320, 533) there was both a warranty as to use and a condition as to alterations, and the latter, which was less stringent in its terms, was held to restrict the warranty.

If the policy deals with the question of change of risk after the policy is effected, and defines what is a hazardous use of the subjects insured, it has been held in America that any other use not expressly excepted is permitted (*Wood*, 1840, 35 Am. Dec. 92; but see *May*, *Insurance*, 2nd ed., s. 218). Repairs necessary for the upkeep of the premises, although usually not included in a provision against alterations, will be prohibited by a stipulation rendering the policy void "if mechanics are employed in building, altering, or repairing the insured premises" (*Imperial Fire Insur. Co.*, 1893, 151 U.S. 452). When specified operations are prohibited by such conditions, it makes no difference whether their effect would be to increase the risk or not; the question of materiality is excluded by the terms of the contract (*Glen*, 1853, 8 Exch. 607).

When notice of alterations is provided for, it must be given within a reasonable time if no time is specified (*Pim*, 1843, 6 M. & G. 1). If the provision is simply that notice of alteration shall be given to the company, without any provision as to forfeiture, failure to give notice will not be regarded as a condition precedent avoiding the policy (*Joyce*, 1858, 71 Am. Dec. 536). A provision against alterations usually takes the form of a clause of forfeiture, and where this is the case, it is entirely immaterial to inquire whether the loss was occasioned by the alteration, or by an increase of the risk incident to it (*Merriam*, 1838, 32 Am. Dec. 252). When, on the other hand, losses arising from any particular use of the premises are excepted from the risk, it must be proved that the loss arose from the excepted risk (see *Wood*, 1840, 35 Am. Dec. 92, at p. 95).

#### IV. THE RISK INSURED AGAINST—EXCEPTED RISKS.

*Causa proxima*.—The risk against which a fire policy provides is loss or damage "by fire"; but to the risk so defined there are various exceptions expressed in the conditions of the policy, and intended to limit the general liability. Among the more usual of these exceptions are losses by lightning, by explosion, by incendiarism, and by riot or military or usurped power. In dealing with the question whether the loss or damage was caused by a peril insured against, the general rule is that where there are two or more causes forming a chain of events leading up to the loss, the cause nearest in point of time is to be regarded as the cause of the loss, in accordance with the maxim *causa proxima non remota spectatur*. The maxim applies whether the insurance is against marine or fire risks, or against accident (*Marsden*, 1865, L. R. 1 C. P. 232; *Ionides*, 1863, 14 C. B. (N. S.) 259; *Pink*, 1890, 25 Q. B. D. 396; *Lawrence*, 1881, 7 Q. B. D. 216). Thus a policy against fire, or against perils of the sea, will cover a loss the proximate cause of which is fire, although the fire was itself caused by the negligence of the insured or his servants (*Dobson*, 1827, 1 Moo. &

M. 90; *Bishop*, 1827, 7 B. & C. 219; *Columbia Ins. Co.*, 1836, U.S. 10 Peters, 507, 12 Curtis, 216). An exception to the strict application of the maxim is, however, recognised where the loss results, although not proximately from the peril insured against, yet as a natural or necessary consequence of it (*Isitt*, 1889, 22 Q. B. D. 504; *Montoya*, 1851, 6 Exch. 451, which may be contrasted with *Pink*, *supra*). Thus damage caused by water used to extinguish a fire, damage caused by the removal of goods, and even the voluntary destruction of buildings to prevent the spread of fire, are all within the general terms of a fire policy (per Kelly, C. B., in *Stanley*, 1868, L. R. 3 Exch. 71, 74; *City Fire Ins. Co.*, 1839, 34 Am. Dec. 258). In the case of *Johnston* (1828, 7 Shaw, 52) a fire broke out in a house on the opposite side of the street from the house insured, and in consequence the walls were left standing in an insecure condition. They were ordered to be taken down by the Dean of Guild; and in the course of this operation, two days after the fire, the walls fell and did considerable damage to the house insured. It was held that the falling of the walls was a natural consequence of the fire, and that the insurers were liable. In *Gaskarth* (Times, 24 July 1876) it was ruled by Lord Justice Lindley that where the wall of a building, gutted by fire, fell seven days after the fire during a violent gale of wind, the fire, as the cause of loss, was too remote, and the insurers were not liable.

*Excepted Risks.*—Where the policy excepts certain risks, liability will be excluded for all losses which are a natural result or reasonably to be expected from the operation of the excepted risk (*Walker*, 1888, 22 L. R. Ir. 572, *infra*; see also *Tweed*, 1868, 7 Wallace, U.S. 44; *Boon*, 1877, 95 U.S. 117, 130). In fact the exception of specified risks is unmeaning unless what is contemplated is that the proximate cause of the loss is fire, the fire being itself the result of the excepted risk, because it is only losses by fire which are covered by the general terms of the policy.

The usual clause of excepted risks is as follows: "This policy does not cover (*certain specified articles, such as jewels, pictures, etc.*), nor loss or damage by fire to property occasioned by or happening through its own spontaneous fermentation or heating; nor loss or damage by fire arising by or through invasion, foreign enemy, riot, civil commotion, or military or usurped power; nor loss or damage by explosion, except loss or damage by explosion of gas in the premises referred to in this policy, not forming part of any gaswork." Some policies include, in addition, "loss or damage to stock or goods whilst undergoing any process in which the application of fire-heat is necessary," "loss by lightning," and "loss by incendiarism." Some of these exceptions merely express the rule of common law; while others substantially modify the rule of law in favour of the insurer.

It is proposed to deal with them *seriatim*, subject to the general observation that differences in the terms of the clause, although apparently slight, may lead to a difference of construction.

*Lightning.*—A loss by lightning, not accompanied by fire, is not covered by a fire policy, and it has been held that an express exception of "losses by lightning" means "losses by fire originated or caused by lightning," which would otherwise, on the principle of proximate cause, fall within the policy (*Kenniston*, 1843, 40 Am. Dec. 193; but see *infra*, *sub voce Explosion of Gunpowder*).

*Overheating.*—Damage to goods whilst undergoing a process of manufacture by the unskilful or negligent use of heat as an agent in the process, is not a loss by fire within the general terms of a fire policy, and it is thus immaterial whether it is excepted from the risk or not (*Austin*, 1816, 6



Taunt. 436; 2 Marshall, 130; see also reports at *Nisi Prius*, Holt, 126, 4 Camp. 360, and observations in *Scripture*, 1852, 57 Am. Dec. 111). On the same principle, damage wholly caused by the explosion of a steam-boiler in the ordinary course of working is not covered by a fire policy, but loss by fire which is itself caused by the scattering of lighted materials by the explosion will be covered unless expressly excepted from the risk (*Millaudon*, 1849, 50 Am. Dec. 550).

*Explosion of Gunpowder or Inflammable Gas.*—Three cases may arise under this exception: (1) where the damage is entirely due to an explosion not accompanied by fire; (2) where the fire originates in an explosion; and (3) where the explosion occurs in the course of a fire. A loss exclusively due to explosion is not covered by a fire policy. In the case of *Everett* (1865, 19 C. B. (N. S.) 126) the insurers were held not to be liable where a gunpowder magazine exploded at a distance of about a mile from the insured premises, and the damage was due to the concussion alone, but it is thought that the principle of the decision would apply equally if the explosion occurred on the premises insured. In America it has been held that when an explosive vapour comes in contact with a gas jet or other ordinary light in premises where a process of manufacture is carried on, and an explosion occurs, the loss is by explosion and not by fire, although theoretically there must have been ignition and combustion of the gas before its explosion (*United Fire Ins. Co.*, 1872, 10 Am. Rep. 735; *Transatlantic Fire Ins. Co.*, 1880, 40 Am. Rep. 403; May on *Insurance*, 2nd ed., s. 416: *contra Scripture*, 1852, 57 Am. Dec. 111).

When an explosion occurs in the course of a fire, and the insured is permitted to keep gunpowder on the premises, the loss by explosion as well as by fire would be covered, the explosion being a natural incident of the fire, which the insurers must be held to have had in view when the permission to store gunpowder was given (*Renshaw*, 1890, 23 Am. St. Rep. 904; *Waters*, 1837, U.S., 11 Peters, 213, 12 Curtis, 400, at 406). Again, a fire policy will, unless there is an express exception of losses by explosion, cover a loss by fire although the fire originated in an explosion (see cases cited *infra*, and *Transportation Co.*, 1870, U.S., 12 Wallace, 194, 200).

In *Stanley* (1868, L. R. 3 Exch. 71) the policy provided that the company should not be responsible "for loss or damage by explosion, except for such loss or damage as shall arise from explosion by gas." The policy covered certain buildings and their contents in which a process of manufacturing oil from "shoddy" was carried on. An inflammable vapour escaped from the vessel containing it owing to a leak, and took fire at a lamp. It burned for a short time, setting fire to certain articles in its neighbourhood. It then exploded, causing great damage by concussion, after which the fire became general. The explosion was held not to be an explosion "by gas" within the meaning of the proviso to the exception, these words referring to common coal gas. The case was treated on the footing that the explosion had occurred during the course of the fire, and it was held that the exception excluded liability (1) for the loss due to explosion, and (2) for the loss caused by the fire so far as due to the explosion, limiting the insured's right to recover to the loss by fire before the explosion, and to such loss after the explosion as he could prove was independent of it. In a case decided in the Outer House by Ld. Kyllachy the policy contained the following special clause dealing with explosions of gunpowder: "The company will not be responsible for damage arising from the explosion of gunpowder, or in consequence thereof." A fire originated in a cellar where several kegs of gunpowder were stored. These exploded, and the fire found its way into the pursuer's shop in consequence of the

roof of the cellar being blown out by the explosion. His Lordship held that the exception covered the loss by fire, which spread to the insured goods as a result of the explosion, and that the insurers were not liable (*Aitken Bros. v. The Midland Counties Ins. Co.*, 3 Dec. 1890, not reported).

The question has been raised in America, upon the terms of the general clause of exception, whether "loss or damage by explosion" is to be read as covering losses caused by fire originating in explosion, or as confined to losses by explosion itself. The former construction was adopted in *United Fire Ins. Co.* (1872, 10 Am. Rep. 735) and *Transatlantic Fire Ins. Co.* (1880, 40 Am. Rep. 403), and the latter in *Commercial Ins. Co.* (1872, 16 Am. Rep. 557) and *Boatman Fire Ins. Co.* (1872, 13 Am. Rep. 228); (see also May on *Insurance*, 2nd ed., ss. 416 *et seq.*).

*Incendiarism.*—Where the policy excepts losses occasioned by incendiarism, the exception is not confined to acts of incendiarism on the part of the insured or upon the insured premises. It covers all loss by fire which is the natural consequence of an act of incendiarism, although committed on premises other than those insured, and without any intention on the part of the incendiary to destroy the buildings insured. If no new cause intervenes between the act of incendiarism and the fire sufficient to operate as a cause by itself, the loss is a loss by incendiarism (*Walker*, 1888, 22 L. R. Ir. 572). When property is destroyed by fire the onus of proof is upon the insurers to show that the fire originated in the act of an incendiary, so as to make the exception applicable (*Gorman*, 1877, Ir. R. 11 C. L. 224).

*Riot or Civil Commotion.*—The full clause in which this exception occurs includes "loss or damage by fire arising by or through invasion, foreign enemy, riot, civil commotion, or military or usurped power." Originally the clause did not include riot and civil commotion; they were introduced in consequence of the decision in *Drinkwater* (1767, 2 Wils. 363), where it was held that the burning of a house by a mob during a bread riot did not fall within the exception of loss or damage by usurped power, a term which referred to an organised attempt by force of arms to usurp the authority of the established Government. In the case of *Langdale* (1780, 2 Parke on *Insurance*, 8th ed., 965) the exception contained the words "civil commotion," which were held to cover the case of the Catholic Riots in 1780, and to exclude liability for a house destroyed by fire by the mob.

It is thought that the terms riot and civil commotion would not cover a mere breach of the peace; they are used in the English sense, and are really equivalent to mobbing and rioting, and imply that a number of persons are assembled with a common object (other than revolution or insurrection), which they proceed to carry out by violent means, to the alarm of the lieges (Hume, vol. i. ch. 16; Hawkins, *Pleas of the Crown*, ch. 65).

*Military or Usurped Power.*—The only question which has been raised upon this clause is whether the terms are to be read conjunctively or disjunctively. The question was discussed in a case already referred to (*Boon*, 1877, 95 U.S. 117), where the military forces of the American Federals, before evacuating a town, had destroyed by fire certain buildings to prevent them falling into the hands of the Confederate troops. It was held that the real cause of the loss was the usurped power of the besieging force, and that, even if the clause were read as meaning military *and* usurped power, the insurers would not be liable. An opinion was, however, indicated that the true meaning of the clause was disjunctive, and that it included acts by regular military power as well as by usurped military power.

## V. ADJUSTMENT OF THE LOSS.

*Notice—Preliminary Proofs, etc.*—If parties expressly make it a condition precedent to the liability of the insurers that the insured should state or prove his claim in any particular manner, then, however immaterial the provision may seem, a failure to comply with it will defeat the insured's right to recover, unless it appear to be so capricious and unreasonable that a Court of law ought not to enforce it, or to be *sua naturâ* incapable of being made a condition precedent (*London Guarantee Co.*, 1880, 5 App. Ca. 911, per *Ld. Watson*, 919). Thus if the policy require as a condition of the insurer's liability that notice of the loss, or preliminary proofs of the loss, shall be given within a specified time, it is essential that this condition should be fulfilled (*Mason*, 1853, 8 Exch. 819; *Roper*, 1859, 1 El. & El. 825). It was made a condition of the policy in the case last cited, that "all persons insured by this company, sustaining any loss or damage by fire, shall forthwith give notice thereof to the directors or secretary of this company, at their office in M.; and within fifteen days after such fire, deliver in as particular an account of their loss or damage as the nature of the case will admit of." The insured presented no account within fifteen days. It was held that he was not entitled to recover. Under an accident policy it has been held that it was not a sufficient answer to a plea founded on the failure to give notice, that the insured was killed by the accident, and that it was therefore impossible to give notice (*Gamble*, 1869, Ir. R. 4 C. L. 204; *Patton*, 1887, 20 L. R. Ir. 93). But in the Supreme Court of the United States it has been held that the insurers could not plead want of notice when the insured had become insane (*Germania Fire Insur. Co.*, 1870, 12 Wallace, U.S. 433; *May on Insurance*, 2nd ed., s. 465).

A condition that the insured's statement of loss should be accompanied by the certificate of a minister has been sustained as a condition precedent, where the minister refused, without fault on the part of the insured, to give the certificate (*Worsley*, 1796, 6 T. R. 710, see p. 718).

When the terms of the policy do not clearly indicate that notice or proofs of loss within the specified time is a condition precedent, the Court will adopt the construction most favourable to the insured. Thus in *Weir* (1879, 4 L. R. Ir. 689) it was provided that within fifteen days the insured should deliver an account of the property destroyed, and that "in default thereof no claim in respect of such loss or damage shall be payable until such notice, account, etc., are given and produced." It was held that the effect of the last words was to differentiate the case from *Mason*, and that delivery of an account within fifteen days was not a condition precedent (see also *Stonham*, 1887, 19 Q. B. D. 237). When the proof to be furnished was "proof satisfactory to the directors of the company . . . together with such further evidence or information, if any, as the said directors shall think necessary to establish that claim," it was held that this provision must not be read so as to render the contract inoperative, and that accordingly the proof to be furnished must be such as reasonably to satisfy the directors, and that they could not capriciously reject satisfactory proof (*Braunstein*, 1861, 1 B. & S. 782; see also per *Ld. Rutherford Clark* in *Bullantine*, 1893, 21 R. 305). As to the construction of the term "forthwith," etc., see *May on Insurance*, 2nd ed., s. 462. Fraud on the part of the insured in the statement in the preliminary proofs vitiates the contract, and entitles the company to reject the whole claim (*Haigh*, 1812, 3 Camp. 319, 13 R. R. 813). This is usually made an express condition of the contract (*Chapman*, 1870, 22 L. T. (N. S.) 306; *Claflin*, 1883,



110 U.S. 81). Statements in the preliminary proofs are inadmissible as evidence for the insured, but they may be used against him as admissions against interest, subject to his right to show that the statements are inaccurate and were inadvertently made (May on *Insurance*, 2nd ed., s. 465).

*Waiver.*—Since the conditions as to preliminary proofs are inserted for the benefit of the insurers, they may be waived by them, either expressly or by conduct on their part leading the insured to believe that compliance with them will not be required, or will be useless. Thus the condition either as to notice or proof of loss is held to be waived when the company repudiates all liability upon the policy on other grounds than the want of notice or the absence or insufficiency of the preliminary proofs, *e.g.* on the ground of fraud (*Strong*, 1825, 3 Bing. 304, 312), or on the ground that no completed contract had been concluded at the time of the loss (*Taylor*, 1849, 9 Howard, U.S. 390, 18 Curtis, 191). In such cases the insured is entitled to assume that it would be useless to furnish preliminary proofs, since this would not meet the defence relied on by the company (*Firemen's Ins. Co.*, 1887, 1 Am. St. Reps. 398). Similarly, in a recent case of accident insurance it was held that where the company insist upon a *post mortem* examination of the deceased (after the period prescribed by the policy for giving notice has expired), and the examination is made, they are precluded from founding on the failure to give notice within the specified time (*Donnison*, 1897, 24 S. L. R. 510). If the company receive preliminary proofs, and retain them until the time specified has expired without intimating to the insured that they are not sufficient or satisfactory, or do not comply with the terms of the policy, they will in the same way be held to have waived objection on these grounds (May on *Insurance*, 2nd ed., s. 468).

*Reinstatement and Measurement of the Loss.*—The amount of the loss under a contract of indemnity—other than a valued policy—is always a question of fact, and there is no hard and fast rule by which it is to be estimated. It is a peculiarity of a fire policy that it contains a stipulation that “the company may, if it think fit, reinstate or replace property damaged or destroyed, instead of paying the amount of the loss or damage,” thus providing two alternative and distinct methods of settlement. If the insurer elects to reinstate, the contract becomes a building contract, and the pecuniary measure of the insurer's obligation has no necessary relation to the amount for which he would have been liable under the other alternative, to indemnify by payment (*Morrell*, 1865, 88 Am. Dec. 396). On this principle an election once made to reinstate cannot be recalled, although the reinstatement would place in the hands of the insured a much more valuable building than before (*Brown*, 1859, 1 El. & El. 853). On the other hand, where the insured has lost possession of the premises, he cannot insist that he should be paid an indemnity for machinery destroyed or injured on the premises, if the company elect to reinstate; but the company are not entitled to perform their obligation so as to confer no benefit upon the insured, and to reinstate in premises no longer in his occupation, but may be required to restore the machinery on other premises to which the insured has removed it (*Anderson*, 1886, 55 L. J. Q. B. 146). These cases are confirmed by the view expressed by the House of Lords in the case of the *Westminster Fire Office* (L. R. 13 App. Ca. 699), already referred to (*supra*, p. 335), that the amount required to reinstate the subjects injured is not necessarily the limit for which insurers are liable under a contract of indemnity and apart from the exercise of the option to reinstate. The House also rejected the view that part of the depreciation in value must be treated as attaching to the site of the buildings and machinery, and thus as

not covered by a fire policy. On this point *Ld. Selborne* said: "The site remains at whatever may have been its value, apart from and independent of the buildings which stood upon it. Any greater value which it had when the buildings which have been destroyed stood upon it was entirely due to those buildings, and as they were insured, and have been destroyed by fire, the contract of indemnity covers, in my opinion, the whole of that difference, less salvage only" (*L. R. 13 App. Ca. 711*).

The amount which the insured is entitled to recover is limited (1) by the injury to the subject insured, (2) by the extent of his interest in the subject, (3) by the amount insured. Thus a mortgagee cannot recover more than the amount of his debt, a vendor under an uncompleted contract of sale can only recover the unpaid purchase money, and a warehouseman or carrier who insures his own interest can only recover, in respect of his customer's goods, the amount of his charges and commission. As to the value of the interest of a tenant, see per *Bowen, L. J.*, in *Castellain*, 1883, 11 Q. B. D. 386, 399-400; and as to the landlord's interest in the analogous case of a covenant in the lease to repair on the part of the tenant, see *Metge*, 1877, 11 C. L. 431; and *Yates*, 1855, 11 Exch. 15.

*Arbitration*.—It is now settled that when it is made in express terms a condition precedent to the right to sue upon the policy, that the amount, if any, which the insurers are liable to pay shall be determined by arbiters, the Courts will not entertain an action upon the policy except for the amount so determined. The rule applies whether the reference is to named or unnamed arbiters (57 & 58 Vict. c. 13), and whether the matter submitted to arbitration is a matter of law or of fact (*Caledonian Insur. Co.*, 1893, 20 R. (H. L.) 13, *L. R.* 1894, A. C. 85; *Scott*, 1856, 5 H. of L. 811; *Vincy*, 1887, 20 Q. B. D. 172; *Bidston*, 1895, 32 S. L. R. 516). The only question is whether the terms of any particular clause of reference have this effect. If it is a mere collateral agreement, not going to the root of the contract, the jurisdiction of the Courts of law is not ousted (contrast *Tredwen*, 1862, 1 H. & C. 72, with *Horton*, 1859, 4 H. & N. 643).

**Fire-raising** is the term used in Scotland to denote the criminal application of fire to inanimate objects. It corresponds generally with the English term "arson," and includes several offences of varying degrees of gravity. Most of these are prosecuted at common law, but charges also arise under the Acts 13 Geo. III. c. 54, s. 4 (*burning heath*), and 29 Geo. III. c. 46 (*burning ships, goods in the loom, etc.*)

I. *Wilful Fire-raising*, the most heinous form of the crime, is constituted by a combination of the following circumstances:—

- (a) When the person accused has raised fire, without any lawful object, but with the deliberate intention of destroying certain premises or things, whether *directly* by the application of fire to such premises or things, or *indirectly* by its application to something contained in, forming part of, or communicating with them (*Hume*, i. 125-129; *Alison*, i. 429-434; *Pollock*, 1869, 1 Coup. 257; *Smillie*, 1883, 5 Coup. 287).
- (b) When the accused person intended in this way to destroy premises or things of the following description, viz.: a dwelling-house (inhabited or uninhabited), shop, warehouse, stable, barn or other building, a ship, corn in the field, corn in store or in the stackyard, growing woods, underwoods, or a coal-heugh (*Hume*, i. 131, 132; *Alison*, i. 440, 441; *Fallance*, 1846, Ark. 181; *McBain*, 1854, 1 Irv. 461).

- (c) When such premises or things were the property of a person other than the accused, or, if they belonged to him, were in the occupation of another, *e.g.* a tenant or a liferenter (Hume, i. 132, 133; Alison, i. 436, 437; *Markirdy*, 1856, 2 Irv. 474).
- (d) When the fire thus kindled has laid hold of or spread to and consumed some part of, or fixture in, the premises or things the incendiary intended to destroy (*e.g.* floor, door, joist, lining, sarking, thatch, etc.); and if the fire has in this way taken effect, it is immaterial how small the part burned may be, or for how short a time the flames may have continued (Hume, i. 127, 128; Alison, i. 429; *Pollock*, 1869, 1 Coup. 257; *Grieco*, 1866, 5 Irv. 263).

If fire is indirectly applied, destructive intent is inferred from such conduct as indicates utter disregard of the likelihood of the flames spreading—*e.g.*, where a person, meaning to destroy his neighbour's heath, sets fire to furze, and the flames spread to and consume corn or buildings: or where a mob drags the furniture from a house, piles it in the street, and sets it alight, with the result that the house is burned (Hume, i. 130; Alison, i. 434). A man is not guilty of wilful fire-raising by setting on fire that which is his own property, provided that it is not in the occupation of another, is not insured, and does not in burning endanger the lives or property of others (Hume, i. 133; Alison, i. 438; *Black*, 1856, 2 Irv. 577 and 583). It is not settled whether a person, setting fire to his own property over which a creditor holds a heritable security, commits wilful fire-raising; but this charge does not arise from the circumstance that a creditor has attached by a sequestration or poinding moveable subjects burned (*Lawson*, 1865, 5 Irv. 79).

II. *Fire-raising to defraud Insurers* differs from wilful fire-raising in respect that (a) the act must have been done with intent to defraud an insurer: (b) it extends to all premises or things capable of being insured against loss by fire; and (c) it includes setting fire to the property of the person accused (Hume i. 134; Alison, i. 438; *Little*, 1857, 2 Irv. 624; *McAtunney*, 1867, 5 Irv. 363; *Pollock*, 1869, 1 Coup. 257; *Paterson*, 1890, 2 White, 496). In a charge of this kind evidence is admitted to show that at the time of the fire accused's affairs were embarrassed (*Rosenberg*, 1842, 1 Brown, 266); and that previous to that time he had removed from his premises goods which had been insured (*McCredie*, 1862, 4 Irv. 214). If intent to defraud a specified insurer is set forth in the indictment, it is not necessary to state specifically that the premises were insured, what interest the accused had in the policy, or who benefited by the proceeds of the fraud (50 & 51 Vict. c. 35, Sched. A; *Paterson*, 1890, 2 White, 496).

III. *Wicked Culpable and Reckless Fire-Raising* differs from wilful fire-raising in respect that the person accused has in this instance raised fire *without* the deliberate intention of destroying premises or things, but either while he was engaged in some unlawful act, or while he was in such a state of passion, excitement, or recklessness, as not to care what result might follow from his acts (Hume, i. 128; Alison, i. 433; *Phaup*, 1846, Ark. 176; *Macbean*, 1847, Ark. 262; *Flaming*, 1848, Ark. 519; *Stewart, etc.*, 1856, 2 Irv. 359; *Martin*, 1876, 3 Coup. 274; *Smillie*, 1883, 5 Coup. 287). It is not in ordinary circumstances criminal to set fire to premises or things by mere accident or want of due care (*Stewart, etc.*, and *Smillie, supra*).

IV. *Minor Offences and Attempts* are prosecuted on indictment if they are serious, while less heinous cases are charged as malicious mischief or breach of the peace. The following are minor offences: (1) A person



setting fire to his own property to the danger of his neighbour, although the fire was not meant to spread, and did not in fact spread (Hume, i. 134; Alison, i. 438; *Arthur*, 1836, 1 Swin. 124): (2) a person maliciously setting fire to his neighbour's outhouse, shed, hay-stack, peat-stack, wood-heap, heath, furze, moss, etc., when the thing fired is detached from and nowise endangers subjects of the description specified in I. (b), *supra* (Hume, i. 135; Alison, i. 432, 442); (3) a person soliciting or exciting to acts of fire-raising others who refuse to be concerned in such acts (Hume, i. 136; Alison, i. 442); and (4) a person threatening to destroy property by fire, but making no attempt to execute his threat (*ib.*). The attempt to commit any form of fire-raising is an indictable crime (50 & 51 Vict. c. 35, s. 61; Hume, i. 135; Alison, i. 442; *Douglas*, 1827, Syme, 184).

V. *Procedure*.—Fire-raising is no longer capital, and may be tried in the Sheriff Court (50 & 51 Vict. c. 35, s. 56). The forms of charge are statutory (*ib.* s. 2, and Sched. A). It is not necessary to specify in the statement of charge the particular means used in applying fire (*Rosenberg*, 1842, 1 Broun, 266). The punishment varies from penal servitude in grave cases, to a small fine, or even an admonition, in trivial ones.

## Supplemental Notes.



































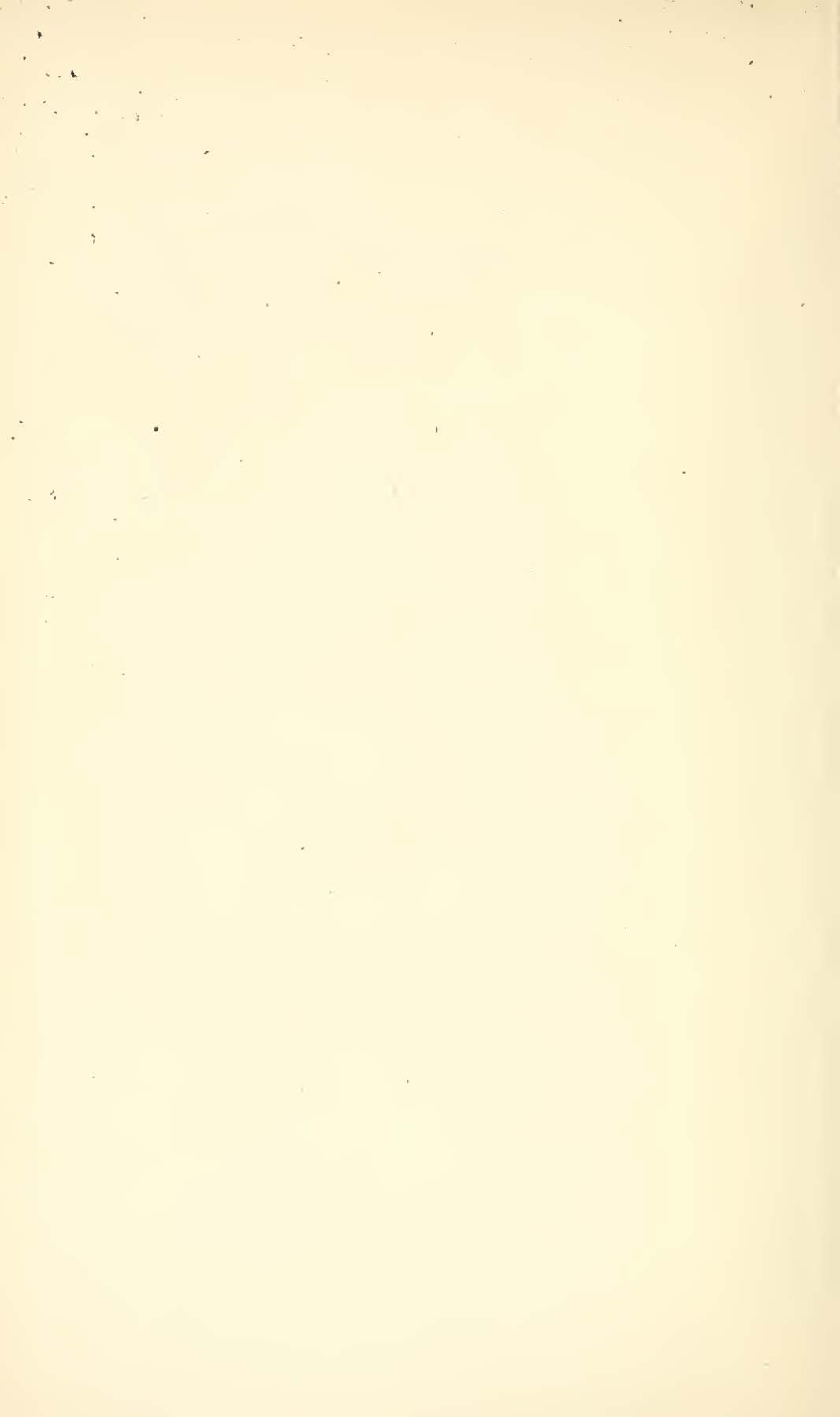












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